LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 12

FEDERAL POWER COMMISSION, PETITIONER

vs.

IDAHO POWER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

PETITION FOR CERTIORARI FILED DECEMBER 19, 1951
CERTIORARI GRANTED MARCH 3, 1952

INDEX

	Original	Print
Proceedings in U.S.C.A. for the District of Columbia Circuit		
Petition for review of an Order of the Federal Power Commission	1	1
Opinion, Prettyman, J.	8	6
Judgment	16	14
Motion for clarification of judgment	16a	15
Order amending judgment	16c	16
Order recalling opinion and judgment	16d	17
Amended judgment and decree	16e	18
Certificate of transcript of record before Federal Power Commission	17	20
Portions of record before Federal Power Commission	23	26
Application for license filed August 22, 1947	23	26
Letter dated September 16, 1947 J. H. Gutride to C. A. Robins, Governor of Idaho	29	34
Notice dated September 19, 1947 of application for major license	31	37
Amendments to application for license filed December 3, 1947	32	38
Exhibit J (Amended)—General map of project area	35	42
Exhibit N (Amended)—Estimate of Project Cost	37	43
Letter dated December 22, 1947 J. H. Gutride to Secretary of Interior	38	44
Notice dated December 26, 1947 of amended application for major license	40	48
Exhibit F (Revised)—Statement pertaining to project lands	41	48
Report by letter dated February 19, 1948 of the Secretary of the Interior to Nelson L. Smith	42	49
Order issued March 3, 1948 authorizing issuance of license (Major)	44	51
Letter dated March 18, 1948 Leon M. Fuquay to Director, Bureau of Land Management, Department of the Interior	49	56
Application for supplementary amendments to application filed April 20, 1949	50	58
Exhibit "J-1"—Project No. 1975—Idaho, Bliss H. E. Development, General Map	53	60
Exhibit "J-2"—Project No. 1975—Idaho, Bliss H. E. Development, Transmission Lines	54	61
Exhibit M—General description and specifications of equipment	56	62
Exhibit N—Estimate of project cost	57	63
Letter dated May 2, 1949 Leon M. Fuquay to Idaho Power Company	58	64
Letter dated July 29, 1949, Leon M. Fuquay to the Secretary of the Interior	59	66
Report by letter dated August 10, 1949, Secretary of the Interior to Nelson L. Smith	61	68
Letter dated August 16, 1949, Joseph H. Gutride to Idaho Power Company	66	74
Letter dated August 24, 1949, J. H. Gutride to Director, Bureau of Land Management, Department of the Interior	67	76

Letter dated September 9, 1949, Idaho Power Company to Federal Power Commission	72	82
Letter dated September 28, 1949 Nelson L. Smith, to the Secretary of the Interior	79	92
Report by letter dated October 4, 1949, Secretary of the Interior to Nelson L. Smith	80	94
Letter dated October 5, 1949 Leon M. Fuquay to Idaho Power Company	82	96
Letter dated October 5, 1949, Idaho Power Company to Federal Power Commission	83	96
Order issued October 13, 1949, superseding order authorizing issuance of license (Major)	86	99
Letter dated October 13, 1949, Secretary of the Interior to Nelson L. Smith	97	110
Complaint of the Secretary of Interior filed October 13, 1949	98	111
Petition of Idaho Power Company for rehearing filed November 10, 1949	105	116
Letter dated November 17, 1949, Secretary of the Interior to Nelson L. Smith	109	119
Letter dated November 28, 1949, Claude L. Draper to the Secretary of Interior	111	122
Modification of petition of Idaho Power Company for rehearing	112	124
Order issued December 4, 1949 extending time for action upon petition for rehearing	113	124
Order modifying order of October 13, 1949, authorizing issuance of license (Major)	114	125
Order extending time to file petition for writ of certiorari	117	128
Order allowing certiorari	118	129
Stipulation as to printing of record	119	130

[fol 1] **IN THE UNITED STATES COURT OF APPEALS**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10530

IDAHO POWER COMPANY, *Petitioner,*

v.

FEDERAL POWER COMMISSION, *Respondent.*

Petition for Review of an Order of the Federal Power Commission

Filed February 7, 1950

To the Honorable, the United States Court of Appeals for the District of Columbia Circuit, and to the Judges thereof:

Idaho Power Company (hereinafter sometimes called the "Company"), being aggrieved by the Order of the Federal Power Commission (hereinafter sometimes called the "Commission") entered on October 13, 1949, in the matter of Project No. 1975, copy of [fol. 2] which is filed herewith as Exhibit A, and by its Order of January 18, 1950 (Exhibit B) denying Petitioner's application for rehearing of said matter, as corrected by Errata dated and issued by the commission on January 31, 1950 (Exhibit C), hereby petitions this Court for review of said Orders of the Commission and respectfully shows:

I.

This petition for review is filed under and pursuant to the provisions of Section 313(b) of the Federal Power Act, U.S.C., Title 16, Sec. 825 l; and is also filed under and pursuant to the provisions of Section 10 of the Administrative Procedure Act, U.S.C., Title 5, Sec. 1009.

II.

Petitioner seeks to have the aforesaid Order of the Commission of October 13, 1949 modified so as to delete therefrom the conditions contained in Paragraph (F), subparagraphs 1-10, inclusive.

III.

1. Idaho Power Company is a corporation duly organized and existing under the laws of the State of Maine, and operating as a public utility in the States of Idaho, Oregon and Nevada. The Company is also an electric public utility and a licensee, as those terms are defined in the Federal Power Act.

2. The Federal Power Commission is the administrative body entrusted with the administration of the Federal Power Act, U.S.C., Title 16, Section 791 *et seq*, (hereinafter sometimes referred to as the "Act").

IV.

The pertinent events leading up to the filing of this petition for Review are set down in chronological order as follows:

[fol. 3] 1. On August 22, 1947, the Company filed with the Commission an application pursuant to the Act for a license for the purpose of constructing, operating and maintaining of a proposed "major project", including a dam and hydroelectric power plant, to be known as the "Bliss Development" and by the Commission designated as "Project No. 1975", on Snake River in Elmore, Gooding and Twin Falls Counties in the State of Idaho, occupying, in part, lands of the United States.

2. On the same day, the Company filed with the commission an application for pre-license consent to initiate preliminary work, preparatory to major construction operations, in advance of action on the application for license.

3. On September 2, 1947, the Commission notified the Company that immediate pursuit of preparatory work would not prejudice the Commission's subsequent consideration and action on the Company's application for license. (1. above).

4. On March 2, 1948, Commission entered its Order authorizing issuance of major license for Project No. 1975, and containing, *inter alia*, Paragraph 23(g) reserving to the Commission the right to determine "at a later date what transmission facilities should be included in the license as a part of the project." Copy of this Order is filed herewith as Exhibit D.

5. On April 20, 1949, the Company filed with the Commission application for amendment of its original application (1. above), to include as a part of the project and within the license for Project No. 1975 two proposed 138-kilovolt transmission lines, both leading from the Bliss power plant, one northwesterly to near the City of

Boise, and the other easterly to near the City of American Falls, both in the State of Idaho.

6. By reason of urgent necessity for providing additional sources [fol. 4] of power for public use in its Idaho, Oregon and Nevada areas of service, the Company on April 26, 1949 applied for pre-license permission to proceed with construction of the aforesaid two 138-kilovolt lines. On May 2, 1949, the Commission notified the Company that such construction would not prejudice consideration by the Commission of the Company's application for amendment of license (5. above).

7. Thereafter, the Commission entered its Order of October 13, 1949 (Exhibit A) which supersedes the Order of March 2, 1948 (4. above), reauthorizes the license for Project No. 1975, and includes therein the two 138-kilovolt transmission lines (5. above). Among the terms and conditions contained in and made a part of said Order of October 13, 1949 are those designated as Paragraph (F), thereof, comprising ten subparagraphs. Such subparagraphs require, among other things: that, upon request of the Secretary of the Interior, the Company shall, after notice, at the expense of the United States, convert its said transmission lines for operation at a voltage of 230-kilovolts; and that the Company, whether or not the Secretary has made such request, or after conversion by the Company for its own needs, to a higher voltage, shall permit any agency of the United States to interconnect any of its transmission facilities with said two transmission lines of the Company. Such subparagraphs also impose numerous conditions and requirements under which the Company must permit interconnection of its said lines with transmission facilities of the United States for transfer over said transmission lines of the Company of power and energy generated in power plants owned by the United States. Said provisions and requirements are stated in said Order of October 13, 1949 to have been inserted therein at the request of the Secretary of the Interior. Said Paragraph (F), including subparagraphs (1) to (10) inclusive, is the reason for the filing of this Petition for Review.

[fol. 5] 8. Within the time provided by statute and on November 10, 1949, the Company, being aggrieved by said Order of October 13, 1949, filed an application for rehearing with respect to the matters as to which review is now sought.

9. On January 18, 1950, the Commission entered an Order (Exhibit B) modifying its Order of October 13, 1949 (Exhibit A), making certain changes informally requested by the Company but denying the aforesaid application for rehearing, and continuing in effect the objectionable and, in the Company's belief, the unlawful

provisions of said Paragraph (F); and on January 31, 1950 entered certain Errata (Exhibit C) making minor corrections in said Order of January 18, 1950.

V.

The points on which Petitioner intends to rely are:

The Commission erred in including in said Order of October 13, 1949 (Exhibit A) the conditions and requirements of Paragraph (F) thereof, for the following reasons:

(a) Said conditions and requirements, and the imposition thereof, constitute administrative legislation violative of the provisions of the Constitution and laws of the United States; and the imposition thereof at the instance and request of the Secretary of the Interior constitutes an abdication of the Commission's function as an independent agency of the United States, in contravention of the statutes creating the Commission and granting its authority.

(b) Said conditions and requirements, and the imposition thereof, constitute an unlawful extension of the authority of the Commission under the Act, particularly Sections 6 and 10(g), and are not in conformity with the provisions thereof, and are inconsistent therewith, with respect to any of the public lands of the United States that may be here involved.

[fol. 6] (c) Said conditions and requirements, and the imposition thereof, constitute an unlawful extension of the authority of the Commission under the Act, particularly Section 4(e) thereof, and are not in conformity with the provisions thereof, and are inconsistent therewith, as none of said conditions and requirements is related to, or necessary for, the adequate protection and utilization of any reservation of the United States that may be here involved.

(d) Said conditions and requirements constitute a reversal of 30 years of administrative construction in that the Commission has never sought to exercise any such authority from the date of its creation on June 10, 1920, to October 13, 1949. Conditions and requirements of the nature set forth in said Paragraph (F) had never been included in any license previously issued by the Commission since its creation.

(e) Said conditions and requirements, and the imposition thereof, operate to deprive petitioner of its property and property rights without due process of law, and to take the property of petitioner for public use without just compensation, in contravention of the Fifth Amendment to the Constitution of the United States.

(f) Said conditions and requirements, particularly those contained in Paragraph (F) (9) of said Order, are *ex post facto* in

their nature and operation, and in violation of Section 6 of the Act, and contrary to Article I of the Constitution of the United States, and would further subject petitioner to the revocation, alteration, or surrender of the license authorized with respect to said transmission lines, in violation of Section 6 of the Act.

(g) Said conditions and requirements, and the imposition thereof, are arbitrary, capricious, and an abuse of discretion, and not in accordance with law, because the same authorize and would permit the United States to use petitioner's said transmission lines, and [fol. 7] compel petitioner to acquiesce in such use to the exclusion of the petitioner's own use of the entire capacity of such lines, in contravention of the Fifth Amendment to the Constitution of the United States.

(h) Said conditions and requirements are arbitrary and unreasonable in that they are indefinite and uncertain, and in that petitioner cannot be advised of its rights and liabilities thereunder.

(i) Said conditions and requirements, and the imposition thereof, are arbitrary, capricious, and an abuse of discretion in that the same are not authorized by the Act, or by any statute, or by any delegation of power to the Commission, or otherwise.

WHEREFORE, Petitioner prays that said Orders of the Commission be reviewed by this Honorable Court and that this Court enter its judgment and decree, modifying said Order of October 13, 1949 by striking therefrom, annulling and setting aside the conditions and requirements of said Paragraph (F) thereof, and remanding the cause to the Commission for further action consistent with the determination of this Court, and that such other and further relief may be granted as may be proper in the premises.

Respectfully submitted,

(S.) A. C. INMAN
1220 Idaho Street
Boise, Idaho

(S.) HARRY A. POTH, JR.
REID & PRIEST
1518 K Street, N. W.
Washington 5, D. C.
Attorneys for Petitioner.

Dated: February 6, 1950, Washington, D. C.

[fol. 8] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[File endorsement omitted]

No. 10530

IDAHO POWER COMPANY, PETITIONER,

v.

FEDERAL POWER COMMISSION, RESPONDENT

On Petition for Review of Order of the Federal Power Commission

OPINION—Filed May 10, 1951

Mr. A. C. Hinman, of the Bar of the Supreme Court of Idaho, *pro hac vice*, by special leave of Court, and *Mr. Harry Poth, Jr.*, for petitioner.

Mr. Willard W. Gatchell, Assistant General Counsel, Federal Power Commission, with whom *Mr. Bradford Ross*, General Counsel, Federal Power Commission, and *Mr. John C. Mason*, Attorney, Federal Power Commission, were on the brief, for respondent.

Before WILBUR K. MILLER and PRETTYMAN, Circuit Judges, and KIMBROUGH STONE, Circuit Judge, retired (sitting by designation).

PRETTYMAN, *Circuit Judge*:

This is a petition to review an order of the Federal Power Commission, granting a license for the construction, operation and maintenance of a power project on federal lands. Petitioner (hereinafter called the "Company") is a private corporation, a public utility, and was the applicant for the license. Its prayer to this court is that the order of the Commission be modified by striking therefrom certain conditions imposed by the Commission upon the license.

In 1947 the Company applied for a license for the construction, operation and maintenance of a hydroelectric project, including a dam and power plant, located on the Snake River in south-central Idaho, occupying in part lands of the United States. This application was pursuant to Section 4(e) of the Federal Power Act.[1] In 1948 the Commission authorized issuance of the license but re- [fol. 9] served "the right to determine at a later date what transmission facilities should be included in the license as part of the project." In 1949 the Company applied for an amendment of its license to include as a part of the project two proposed high-voltage

[1] 41 Stat. 1065 (1920), as amended, 49 Stat. 840 (1935), 16 U.S.C.A. § 797(e).

(138,000 volts) primary transmission lines. One such line was to run approximately 73 miles from the power plant to a point near the City of Boise. The other was to run approximately 116 miles from the plant to a point near the City of American Falls. Both lines crossed lands of the United States, and both joined the Company's interconnected primary transmission system. The company applied for and was granted pre-license permission to proceed with the construction of the two lines, pending consideration of the application for amendment. In October, 1949, the Commission entered an order, which superseded its original order, authorizing the license. Among other things, this new order authorized the construction of the two 138-kilovolt lines as part of the project but imposed upon such construction and operation certain special conditions.

These special conditions are reproduced in full text in footnote 2 below,[2] but they may be summarized as follows:

---

[2] "(F) The construction and operation of the transmission lines from the Bliss plant to substations near American Falls and Boise shall be subject to the following special conditions:

"(1) The licensee shall not convert said lines to permit operation at a higher voltage without prior approval of the Commission. Upon the request of the Secretary of the Interior, under appropriate authority, the licensee shall, after notice of at least one year from the Commission and within the time fixed by the Commission, convert said lines for operation at a voltage of 230 kv at the expense of the United States.

"(2) After the initial construction of the lines or upon conversion of the lines to a higher voltage as herein provided, the licensee shall permit the United States, and the United States shall have the right, to interconnect any of its transmission facilities with said lines in a manner conforming to approved standards of practice for the interconnection of transmission circuits provided there is capacity available in said line or lines in excess of the needs of the licensee. The expense of such interconnection, including the expense of additional switching, relaying, and other protective devices, shall be borne by the United States, provided, however, that no such interconnection may be made without the prior approval of the Commission.

"(3) Upon completion of any such interconnections, the United States shall have the right to transfer energy over said lines as initially or ultimately constructed in such amounts as will not unreasonably interfere with the licensee's use of said lines provided that the licensee shall be obligated to allow the transmission over the said lines by the United States of electric energy only to consuming facilities of the United States and to public bodies and cooperatives entitled to statutory preference in connection with the distribution and sale of electric energy by the United States.

"(4) After any such interconnection of the facilities of the United States with said lines the licensee shall, except in emergencies, maintain in a closed position all connections under the licensee's control between the licensee's lines and the interconnecting facilities provided by the United States.

[fol. 10] The Company shall not convert the lines to permit operation at a higher voltage without prior approval of the Commis-

"(5) Any interconnected power systems of the United States and the licensee shall be operated in parallel and in such manner as to render good and adequate service. Any inadvertent flow of energy from the lines of the United States into said lines or from said lines into the lines of the United States which may occur while the lines of both the licensee and the United States are electrically interconnected shall mutually be compensated for by later return in kind. Any scheduled transfer of energy over said lines for the account of the United States shall be settled for, or any investment in said lines made by the United States shall be liquidated, on reasonable terms under agreements which shall be negotiated between the licensee and the United States, said agreements to be subject to approval by the Commission.

"(6) Until such agreements are completed, settlement for any such scheduled transfers of power shall be made on the following basis: If power and energy from the lines of the United States is transmitted over these lines, the monthly payment for such transmission shall be the amount of dollars representing that part of the monthly cost to the licensee of the section of the line or lines over which the power and energy is transmitted which the maximum transmission by the United States in kilowatts during the month bears to the kilowatt capacity of such section of line or lines. The monthly cost to the licensee referred to herein shall be computed in conformity with the uniform system of accounts prescribed by the Commission.

"(7) In the event the licensee, its successors or assigns, during any period in which the United States is transmitting power over these lines, shall require reciprocal accommodations for the transfer of power from these project lines over any lines of the United States connected to said lines of the licensee, such reciprocal accommodations shall be accorded to the licensee under like terms and conditions as herein provided for the transfer of power from the lines of the United States over said lines of the licensee.

"(8) If, at any time subsequent to the date upon which the licensee commences the transmission of energy over said lines for the United States, the licensee notifies the Commission that the licensee needs for the transmission of electric energy in connection with its operations the whole or any substantial part of the capacity of the said lines, or part thereof, then being utilized by the United States, and the licensee makes satisfactory provision for reimbursement to the United States of the original cost to the United States of the facilities desired by the licensee, less accrued depreciation on the investment of the United States, the licensee may modify or revoke the then existing agreement to remain interconnected and to transmit energy for the United States by giving to the Commission 30 months' notice, of the licensee's intention to utilize additional capacity or the entire capacity of the lines, or part thereof, as the case may be, provided, however, that the United States may continue to utilize any capacity in the said lines to the extent that said capacity, if any, was provided by the United States at its expense without reimbursement by the licensee.

"(9) If at any time in the future the said lines of the licensee are proposed for alteration or are altered, the Commission reserves the right, after 30 days' notice and opportunity for hearing, to make a determination as to whether

sion, but, upon request of the Secretary of the Interior and after one year's notice from the Commission, the Company shall convert the lines for operation at 230 kilovolts. The Company shall permit the United States to interconnect any of its (*i.e.*, the United States') transmission facilities with these two lines, provided there is capacity available in the lines in excess of the needs of the Company. Upon completion of such interconnections the United States shall have the right to transfer energy over the lines in such amounts as will not unreasonably interfere with the Company's use of the lines. After any such interconnection the Company shall, except [fol. 11] in emergencies, maintain in a closed position all connections between the Company's lines and the interconnecting facilities of the United States. If, after the Company commences transmission of energy over its lines for the United States, the Company notifies the Commission that it needs the whole or any substantial part of the capacity of the lines then being utilized by the United States, the Company may modify or revoke the agreement to remain interconnected by giving the Commission 30 months' notice. Any agreement between the Company and the United States in connection with the transmission lines shall be effective only upon approval by the Commission. In the event the Company and the United

---

the lines after such alteration, either proposed or actual, will be subject to licensing by the Federal Power Commission under the then existing laws and regulations, and in the event that the Commission finds that the said alteration in the lines, either proposed or actual, so changes the functions served by said lines and the source of energy transmitted over said lines as to make them, or any part of them, not subject to the licensing authority of the Commission under the then existing laws and regulations, the licensee hereby agrees to secure authority for the continued operation and maintenance of the lines, or such part of the lines, from the appropriate agency of the United States then having jurisdiction over the lands of the United States occupied by the lines, or part thereof, and upon securing said authority the licensee hereby agrees to surrender the license insofar as it authorizes operation and maintenance of the lines, or such parts thereof, which are found to be no longer subject to Commission jurisdiction. In the event that the licensee should fail to surrender the license insofar as it is applicable to the lines, or parts thereof, which may then be found by the Commission not to be subject to its jurisdiction, the Commission reserves the right to take appropriate action to have the license terminated with respect to said lines, or parts thereof, as provided in the then existing laws and regulations.

"(10) Any agreement between the licensee and the United States in connection with said transmission lines or related facilities shall be effective only upon approval by the Commission. In the event the licensee and any agent of the United States are unable to agree with respect to any matter arising in connection with said transmission lines or related facilities, the question thereby raised shall be submitted to the Commission for determination."

States are unable to agree with respect to any matter arising in connection with the transmission lines, the question thereby raised shall be submitted to the Commission for determination.

In sum, the Commission required, as conditions to the license, that the licensee agree to increase the capacity of its lines at Govern- [fol. 12] ment request and thereafter to transmit Government power, the lines to remain interconnected unless and until thirty months' notice is given. The question presented by this petition for review is whether the Commission has authority to impose those conditions upon a licensee for the construction and operation of a power project upon federal lands under the terms of the Federal Power Act.

It is necessary that we first delimit the question. There is no doubt as to the power of Congress to impose such conditions as are proper in its judgment to be imposed upon the use of public lands. The Constitution [3] specifically provides: "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; . . ."

No question of contract is involved. No question is raised as to the character of the transmission lines as primary and thus as part of the power project within the meaning of the statute. No question is raised as to the financial terms incorporated in the proposed conditions; the terms of the license as proposed by the Commission include detailed provisions as to compensation to the Company by [fol. 13] the United States for the expense of converting the lines and for transmitting energy of or for the United States.

As thus delimited the question before us is: Has Congress conferred upon the Commission authority to impose upon a license for a power project on public lands requirements that the licensee increase the proposed capacity of its primary transmission lines, interconnect those lines with power projects of the United States, and transmit over its lines for the United States power generated by or belonging to the United States? We are of opinion that the Commission does not have the statutory authority which it here claims.

The question whether the United States should require a private company, licensed to construct a private power plant on public lands or to cross public lands with its transmission lines, to interconnect its facilities with public power projects, was a major one in the consideration of the policies and terms of power development upon public property. It was a highly controversial issue. During

[3] Art. IV, § 3, cl. 2.

the course of the consideration of the bill which eventually became the Federal Power Act, the subject was broached at least three times, and upon each occasion the witness testifying on behalf of the bill as the representative of the Power Commission assured the Congress that the proposed bill did not make it possible for the Government to utilize the transmission lines of private companies or to require the transmission of power generated by a Government plant over the lines of private operating companies. Three excerpts from this testimony are reproduced in footnote 4 below.[4] Finally

[4] *Hearings before House of Representatives Committee on Interstate and Foreign Commerce on H. R. 5423*, 74th Cong., 1st Sess. (1935):

"Mr. WOLVERTON. Under the provisions of this bill, would it be possible for the Government in any of its electric operations to utilize the transmission lines of private compdies?

"Mr. DEVANE. No, sir; and I want to make that very definite; and if there is any doubt about it, so far as I am concerned, such amendment might be made as to make it clear. . . .

". . . If . . . it is the desire of Congress not to . . . give the municipal or governmental projects the right to use the the transmission lines of private industry—and we have not succeeded in making that clear in this bill—an amendment should be proposed that will do it better. It will receive our hearty endorsement.

"Mr. WOLVERTON. Let me suggest a possible situation. Your answer will clarify my mind considerably as to the effect of this bill in the particular instance. Assume that a municipality built a plant for the generation and distribution of electric energy; assume that a distant community is served by a company that comes under the regulations of this bill in that it procures its electric energy from outside of the State. Could the city which has constructed a plant, but has no transmission lines, utilize the system of transmission lines constructed by the private company?

"Mr. DEVANE. No, sir.

"Mr. WOLVERTON. Then, you do not think that the power given in this bill to the Federal Power Commission would enable it to direct that those transmission lines be so used?

"Mr. DEVANE. Mr. Wolverton, my answer to that is this: That if there is any doubt about it and this committee can remove that doubt by additional words in this bill, let us put them in." (Pp. 514-515.)

"Mr. MAPES. Is it the purpose to compel the privately owned transmission companies to carry the energy of municipal projects as well as private projects?

"Mr. DEVANE. No, sir; I thought I had made that very clear. If I did not, I want to make it very clear now. It is not intended to give the Commission power to require the private lines to take on any power generated by municipal plants or by any Government plant." (P. 546.)

"Mr. DEVANE. . . . The only thing we have discussed is the desirability of making it perfectly clear in this law that it is not the intention of this law to reach out and get control of that power nor is it the intention of this law to authorize this Commission to require the transmission of that power on the lines of these private operating companies." (P. 559.)

[fol. 14] Congress inserted in the statute, as Section 201 (f)[5] a provision that no provision in that Part of the statute shall be deemed to include the United States or any of its agencies. That Part is the Part which deals with, among other things, the interconnection and coordination of facilities. The specific exclusion of the facilities of the United States from the possibility of interconnection and coordination under the terms of that Part of the statute seems clearly to be a declaration of congressional intent upon the subject. So much seems plain enough.

At this point the argument turns to specific terms in the statute. The Federal Power Act is in Parts. Part I deals with licenses and Part II deals with the interconnection of facilities. The exclusion of the United States, which we have just discussed, is in Part II, and its language is: "No provision in this Part shall apply to, or be deemed to include, the United States. . . ."[6] The Commission says that under this language the exclusion applies only to provisions of Part II and has no application to licenses, which are treated in Part I.

We examine Part I. It prescribes the conditions upon which licenses should be issued. It does not mention interconnection with [fol. 15] Government facilities or transmission of Government energy as permissible conditions. But the Commission points to the catchall clause at the end of the specified conditions. That general clause, read in conjunction with the introductory clause of the Section, is: "All licenses issued under this Part shall be on the following conditions: . . . (g) Such other conditions not inconsistent with the provisions of this Act as the Commission may require."[7]

The language prohibits conditions inconsistent with other provisions "of this Act"—not of Part I alone but of the Act. The exclusion of the United States from interconnecting arrangements, while in Part II, is nevertheless in the Act. And so this general clause in Part I, upon which the Commission relies, forbids conditions upon licenses inconsistent with other provisions throughout the Act. Specifically, it forbids, among other things, a condition inconsistent with the exclusion of the United States from interconnection arrangements.

The Commission next says that its general power to prescribe conditions must be interpreted in the light of the opening clauses of the Section (Section 10, which is in Part I) which relates to those conditions. The first subparagraph in that Section reads, in perti-

[5] 49 Stat. 848 (1935), 16 U.S.C.A. § 824(f).

[6] Sec. 201(f), 49 Stat. 848 (1935), 16 U.S.C.A. § 824(f).

[7] Sec. 10(g), 41 Stat. 1070 (1920), as amended, 49 Stat. 844 (1935), 16 U.S.C.A. § 803(g).

nent part: "'All licenses issued under this Part shall be on the following conditions. (a) That the project adopted . . . shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, . . .'" The Commission says that the interconnection of the Company's transmission lines with Government generating and transmission facilities is best adapted to a comprehensive plan for developing a waterway for beneficial public uses and for the improvement and utilization of water-power development in the area. The Section last quoted (Section 10) obviously applies primarily to the type, location, size and purpose of the project. We think that its terms cannot be construed to require the interconnection of private facilities with public facilities and the compulsory transmission of public power by a private company, in view of the fact that Congress specifically forbade such interconnections in the Part of the statute which deals with that subject.

The problem which is presented to us in this case is essentially a legislative problem. Congress has ample power, as we have said, to prescribe the conditions upon which the water-power potentialities of public lands shall be developed. Its only declaration upon the interconnection of Government and private facilities is the one to which we have referred and which precludes that interconnection. [fol. 16] If the Commission believes it to be in the public interest to prescribe such a condition upon power project licenses, it should present its views to the Congress.

The order of the Commission will be modified by the elimination therefrom of paragraph (F), and the order as thus modified will be affirmed. 49 Stat. 869 (1935), 16 U.S.C.A. Sec. 825l(b).

Modified, and affirmed as modified.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1951

No. 10,530

IDAHO POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

On Petition for Review of an Order of the Federal Power Commission

Before: WILBUR K. MILLER and PRETTYMAN, *Circuit Judges*, and KIMBROUGH STONE, *Circuit Judge, retired* (sitting by designation).

JUDGMENT AND DECREE—Filed May 10, 1951

This cause came on to be heard on the transcript of the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, It is ordered, adjudged and decreed by this Court that the order of the said Federal Power Commission on review in this cause be modified, and that this cause be, and it is hereby, remanded to the Federal Power Commission for the entry of an order in accordance with the opinion of this Court.

Per Circuit Judge PRETTYMAN.

Dated: May 10, 1951.

[File endorsement omitted.]

[fol. 16a] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10,530

IDAHO POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

MOTION OF RESPONDENT FEDERAL POWER COMMISSION FOR CLARIFICATION OF JUDGMENT

The Federal Power Commission, respondent, by its counsel, hereby respectfully moves the Court for clarification of the opinion and judgment in the above-entitled proceeding, and in support of its motion shows the following:

1. On May 10, 1951, this Honorable Court issued its opinion and judgment granting the petition of Idaho Power Company to modify the order of the Commission issued October 13, 1949 (as modified by order issued January 18, 1950). The Court stated in the final paragraph:

> The order of the Commission will be modified by the elimination therefrom of paragraph (F), and the case will be remanded to the Commission for the entry of an order in accordance with this opinion.
>
> Remanded for modification of order.

2. It is clear from the quoted paragraph that paragraph (F) of the Commission's order must be eliminated. However, it is not clear whether the opinion and judgment requires the Commission to enter an order in the exact form of the original order, after eliminating paragraph (F), or whether the Commission is free to reconsider the remainder of the order and to enter such other order as it deems warranted in the exercise of its administrative discretion under the Federal Power Act. The ruling of the Court may be interpreted as requiring the Commission to readopt its order without paragraph (F), which would be a determination by this Court, rather than the Commission, that as so amended the order would be in the public interest. The determination of whether a license should issue without paragraph (F), or what license conditions, if any, may be otherwise appropriate, is a determination for which the Commission has been given primary responsibility and the responsibilities of the Commission under the Federal Power Act should not be predetermined by this Court.

[fol. 16b] 3. The more reasonable view appears to be that the quoted paragraph of the opinion and judgment means no more than that the Commission in its further action upon remand is to respect and follow the Court's determination of the question of law (lack of authority to impose paragraph (F)) but is not foreclosed from further exercising its administrative discretion in issuing a further order in this case which may differ from its original order. *Texas and Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 444 (1906); *Fed. Radio Comm.* v. *Nelson Bros.*, 289 U.S. 266, 278 (1932); *Ford Motor Co.* v. *N.L.R.B.*, 305 U.S. 364, 374 (1938); *F.C.C.* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145-6 (1940)

4. In view of the above it is respectfully requested that this Honorable Court clarify its opinion and judgment to make it certain that the Commission may reconsider the provisions of its order, other than paragraph (F), and may exercise its administrative discretion in modifying the order in accordance with the provisions of the Federal Power Act after eliminating paragraph (F).

Respectfully submitted,

(S.) BRADFORD ROSS,
General Counsel.

[fol. 16c] No. 10,530

IDAHO POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

Before: WILBUR K. MILLER and PRETTYMAN, *Circuit Judges*, and KIMBROUGH STONE, *Circuit Judge*, retired (sitting by designation).

Order

On consideration of respondent's motion for clarification of the opinion and judgment of this Court in the above-entitled cause, it is

Ordered by the Court that the opinion filed herein May 10, 1951, be and it is hereby, modified by striking therefrom the last paragraph and the words "Remanded for modification of order" following said paragraph, and that in lieu thereof the following be inserted:

> "The order of the Commission will be modified by the elimination therefrom of paragraph (F), and the order as thus modified will be affirmed. 49 Stat. 860 (1935), 16 U.S.C.A. Sec. 825l(b).
>
> Modified, and affirmed as modified."

It is further ordered by the Court that the judgment and decree entered in this cause on May 10, 1951, be, and it is hereby, amended to read as follows:

[fol. 16d] "This cause came on to be heard on the transcript of the record from the Federal Power Commission, and was argued by counsel.

"On consideration whereof, It is ordered, adjudged and decreed by this Court that the order of the said Federal Power Commission on review in this cause be, and it is hereby, modified by striking therefrom paragraph (F) thereof, and that the order of the Federal Power Commission herein as thus modified be, and it is hereby, affirmed."

Per Circuit Judge PRETTYMAN.

Dated: September 21, 1951.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT
April Term, 1951

No. 10,530

IDAHO POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

Order

It appearing that the Court on September 21, 1951 entered an order amending the opinion and judgment of this Court entered herein May 10, 1951, it is

Ordered by the Court that the certified copies of the opinion and judgment of this Court in the above-entitled case, which issued to the Federal Power Commission on May 29, 1951, be recalled, and that the Clerk be, and he is hereby, directed to issue to the Federal Power Commission certified copies of the opinion and judgment of this Court as modified by the order of this Court dated September 21, 1951.

Per Curiam.

Dated: September 24, 1951.

United States Court of Appeals for the District of Columbia Circuit. Filed September 24, 1951. Joseph W. Stewart, Clerk.

United States Court of Appeals for the District of Columbia Circuit. Filed November 29, 1951. Joseph W. Stewart, Clerk.

[fol. 16e] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1951

No. 10,530

IDAHO POWER COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION, RESPONDENT

Before: WILBUR K. MILLER and PRETTYMAN, *Circuit Judges*, and KIMBROUGH STONE, *Circuit Judge, retired* (sitting by designation).

JUDGMENT AND DECREE

This cause came on to be heard on the transcript of the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, It is ordered, adjudged and decreed by this Court that the order of the said Federal Power Commission on review in this cause be, and it is hereby, modified by striking therefrom paragraph (F) thereof, and that the order of the Federal Power Commission herein as thus modified be, and it is hereby, affirmed.

Per Circuit Judge PRETTYMAN.

Dated May 10, 1951.

[fol. 16f] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

I, JOSEPH W. STEWART, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing is a true copy of the judgment and decree of the said Court of Appeals dated May 10, 1951, as same was amended by the order entered September 21, 1951, in the case of:

IDAHO POWER COMPANY, PETITIONER,

v.

FEDERAL POWER COMMISSION, RESPONDENT.

No. 10,530, April Term, 1952, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix

the seal of said Court of Appeals, at the city of Washington, this first day of February, A. D. 1952.

[SEAL]

United States Court of Appeals for the District of Columbia Circuit

JOSEPH W. STEWART

Clerk of the United States Court of Appeals for the District of Columbia Circuit.

[fol. 17] **IN UNITED STATES COURT OF APPEALS**
[Title Omitted]

CERTIFICATE OF TRANSCRIPT OF RECORD—March 20, 1950

Pursuant to the provisions of Section 313(b) of the Federal Power Act, the Federal Power Commission, in connection with the above-entitled proceeding, hereby certifies that the documents described below and attached hereto are true and correct copies of said documents now on file with the Commission and constitute the transcript of the record upon which its orders, complained of, were entered in the matter of Idaho Power Company, Project No. 1975

Description of Document	*Volume*	*Page*
Letter, dated August 22, 1947, from Leighton and Gamble, transmitting application for license, filed August 22, 1947	1	1
Application for license and exhibits, filed August 22, 1947	1	3
Letter, dated August 25, 1947, from Leighton and Gamble, making corrections in letter filed August 22, 1947, filed August 25, 1947.	1	26
Letter, dated August 29, 1947, from Leighton and Gamble, making correction in letter and application filed August 22, 1947, filed August 29, 1947.	1	27
Letter, dated September 2, 1947, from Federal Power Commission to Idaho Power Company, advising that drilling of test holes and performance of other preliminary work will not prejudice consideration of application for license.	1	28
Letter, dated September 15, 1947, notifying Public Utilities Commission of Idaho of filing of application for license.	1	29
Letter, dated September 16, 1947, notifying the Governor of Idaho and other parties of filing of application for license.	1	30
Notice, dated September 19, 1947, of application for license, filed with the Federal Register Division, National Archives, for publication.	1	32
[fol. 18] Proof of publication of Notice of Application in the Times-News, Twin Falls, Idaho, filed October 31, 1947.	1	33

Description of Document	Volume	Page
Proof of publication of Notice of Application in the Gooding Leader, Gooding, Idaho, filed November 17, 1947.	1	34
Letter, dated November 26, 1947, from Idaho Power Company, transmitting amendment to application for license, together with certain exhibits, filed December 3, 1947.	1	35
Amendments to application for license, together with amended and supplemental exhibits, filed December 3, 1947.	1	36
Letter, dated December 8, 1947, from Leighton and Gamble, making correction in application last above, filed December 9, 1947.	1	66
Letter, dated December 22, 1947, from FPC to the Chief of Engineers, Department of the Army, transmitting application for license and exhibits for report and approval in accordance with Section 4(e) of the Federal Power Act.	2	67
Letter, dated December 22, 1947, from FPC to the Secretary of Interior, transmitting application for license and exhibits for report under Sections 4(e) and 18 of the Federal Power Act and the provisions of Public Law 732, 79th Congress, 2nd Session, approved August 14, 1946.	2	69
Letter, dated December 26, 1947, from FPC to Public Utilities Commission of Idaho, notifying it of filing of amendment to application for license.	2	71
Letter, dated December 26, 1947, from FPC to the Chairman, Board of County Commissioners, Elmore County, Idaho, and the Mayor, Glenns Ferry, Idaho, notifying them of the filing of application for license.	2	72
Letter, dated December 26, 1947, from FPC to the Governor of Idaho and other agencies and officials, notifying them of the filing of amendments to application for license.	2	73
Notice, dated December 26, 1947, of amended application for major license, forwarded to the Federal Register Division of the National Archives for publication.	2	75
Letter, dated January 2, 1948, from Public Utilities Commission of Idaho commenting on amended application, filed January 6, 1948.	2	76

Description of Document	Volume	Page
Comments, dated January 10, 1948, of the State of Idaho Departments of Fish and Game, filed January 16, 1948.	2	77
Proof of publication of Notice of Amendment to Application in the Times-News, Twin Falls, Idaho, filed February 2, 1948.	2	78
Letter, dated February 9, 1948, from Idaho Power Company, transmitting copies of revised Exhibits C, D, E, and F, filed February 13, 1948.	2	80
[fol. 19] Revised Exhibits C, D, E, and F, filed February 13, 1948.	2	81
Report, dated February 19, 1948, of the Secretary of Interior, filed February 20, 1948.	2	83
Proof of publication of Notice of Amendment to Application in the Mountain Home News, Mountain Home, Idaho, filed February 26, 1948.	2	85
Order authorizing issuance of license, entered March 2, 1948, and issued March 3, 1948.	2	87
Letter, dated March 3, 1948, serving order last above on Applicant and other interested parties.	2	92
Notice, dated March 4, 1948, of order authorizing issuance of license forwarded to the Federal Register Division of the National Archives for publication.	2	93
Report, dated March 9, 1948, of the Chief of Engineers, filed March 12, 1948.	2	94
Proof of publication of Notice of Amendment to Application for license in the Gooding Leader, Gooding, Idaho, filed March 15, 1948.	2	96
Letter, dated March 18, 1948, from FPC, notifying the Bureau of Land Management, Department of Interior, of the reservation from entry, etc., pursuant to Section 24 of the Federal Power Act, of lands of the United States included in the project.	2	98
Letter, dated March 22, 1948, from FPC to Idaho Power Company, forwarding Exhibits J, K and L for correction by Applicant.	2	99

Description of Document	Volume	Page
Letter, dated May 25, 1948, from Leighton and Gamble, transmitting the revised Exhibit L, Sheets 1 to 3, inclusive.	2	100
Revised Exhibit L, Sheets 1 to 3, inclusive, filed May 25, 1948.	2	101
Letter, dated May 27, 1948, from Geological Survey, Department of Interior, relating to stream gaging requirements, filed May 28, 1948.	2	104
Supplemental report, dated May 27, 1948, by the Secretary of Interior, filed May 28, 1948.	2	106
Letter, dated June 3, 1948, from Leighton and Gamble, transmitting revised Exhibit L, Sheet 4, filed June 3, 1948.	3	108
Revised Exhibit L, Sheet 4, filed June 3, 1948.	3	109
Application for supplementary amendments to application for license requesting authority to construct, operate and maintain two transmission lines as part of the project, together with exhibits, filed April 20, 1949.	3	110
[fol. 20] Letter, dated April 26, 1949, from Leighton and Gamble, requesting on behalf of Applicant that the Commission give pre-license consent immediately to commence construction of two primary transmission lines.	4	140
Letter, dated May 2, 1949, from FPC to Idaho Power Company, advising that pre-license construction of the two transmission lines at its own risk, subject to the requirements of the agencies having jurisdiction over the Government lands involved, will not prejudice consideration by the Commission of the application filed April 20, 1949.	4	143
Letter, dated July 1, 1949, from M. O. Leighton, transmitting revised Exhibit F and Exhibits J, K and P, filed July 1, 1949.	4	144
Revised Exhibit F and Exhibits J, K and P, filed July 1, 1949.	4	146
Letter, dated July 29, 1949, from FPC, forwarding revised Exhibits J and L to the Chief of Engineers for approval and a supplemental report.	4	163

Description of Document	*Volume*	*Page*
Letter, dated July 29, 1949, to the Secretary of Interior, forwarding application filed April 20, 1949, as amended, and requesting a report pursuant to Section 4(e) of the Federal Power Act.	4	164
Report, dated August 10, 1949, of the Secretary of Interior, filed August 11, 1949.	4	166
Letter, dated August 16, 1949, from FPC to Idaho Power Company, transmitting copy of the report of the Secretary of Interior last above.	4	171
Report, dated August 10, 1949, of the Chief of Engineers, filed August 19, 1949.	4	172
Letter, dated August 24, 1949, from FPC, notifying the Bureau of Land Management, Department of Interior, of the reservation from entry, etc., pursuant to Section 24 of the Federal Power Act, of lands of the United States included in the project.	4	174
Letter, dated September 9, 1949, from Idaho Power Company, together with enclosures, relative to the report of the Secretary of Interior, filed September 12, 1949.	4	179
Letter, dated August 23, 1949, from the Secretary of Interior, transmitting Appendices A and B, together with said Appendices A and B supplementing the report filed by the Secretary of Interior on August 11, 1949, filed August 24, 1949.	4	200
Letter, dated September 19, 1949, from FPC to the Secretary of Interior, inviting further report with respect to licensing conditions relating to transmission lines.	4	213
Letter, dated September 23, 1949, from M. O. Leighton, making corrections in letter field September 12, 1949, filed September 23, 1949.	4	214
[fol. 21] Letter, dated September 29, 1949, from FPC to the Secretary of Interior, requesting that conditions relating to transmission lines be submitted by October 3, 1949.	4	215
Further report, dated October 4, 1949, by the Secretary of Interior, together with enclosures, filed October 4, 1949.	4	216

Description of Document	*Volume*	*Page*
Letter, dated October 5, 1949, from FPC to Idaho Power Company, transmitting a copy of the report by the Secretary of Interior.	4	221
Letter, dated November 10, 1949, from Idaho Power pany, commenting on report of Secretary of Interior, filed October 6, 1949.	4	222
Order superseding order authorizing issuance of license, entered and issued October 13, 1949.	4	225
Letter, dated October 13, 1949, from the Secretary of Interior, transmitting complaint.	4	236
Complaint of the Secretary of Interior, filed October 13, 1949.	4	237
Letter, dated October 13, 1949, from FPC, serving order entered and issued October 13, 1949, on interested parties.	4	244
Letter, dated October 14, 1949, from FPC, serving complaint of Secretary of Interior.	4	245
Notice, dated October 14, 1949, on order superseding order authorizing issuance of license, sent to the Federal Register Division of the National Archives for publication.	4	246
Applicant's petition for rehearing, filed November 10, 1949.	4	247
Letter, dated October 5, 1949, from Idaho Power Com-Company, relating to complaint of Secretary of Interior, filed November 14, 1949.	4	251
Letter, dated November 14, 1949, from Idaho Power Company, requesting reconsideration and modification of order issued October 13, 1949.	4	252
Letter, dated November 17, 1949, by the Secretary of Interior, relating to provisions of order issued October 13, 1949.	4	258
Letter, dated November 28, 1949, from FPC to the Secretary of Interior, in reply to letter last above.	4	260
Modification of petition for rehearing by Idaho Power Company, filed November 30, 1949.	4	261

Description of Document	*Volume*	*Page*
Report, dated November 30, 1949, by the Secretary of Interior, filed December 1, 1949.	4	262
Statement of the Secretary of Interior in opposition to the Applicant's petition for rehearing, filed December 1, 1949.	4	263
[fol. 22] Order extending time for action upon petition for rehearing, entered December 13, 1949, and issued December 14, 1949.	4	273
Letter, dated December 14, 1949, from FPC, serving a copy of order last above.	4	274
Order modifying order of October 13, 1949, authorizing issuance of license, entered and issued January 18, 1950.	4	275
Letter, dated January 18, 1950, from FPC, serving order last above.	4	278
Notice, dated January 19, 1950, of order modifying order of October 13, 1949, authorizing issuance of license, sent to the Federal Register Division of the National Archives for publication.	4	279

By the Commission.

In witness whereof I have hereunto subscribed my name and caused the seal of the Federal Power Commission to be affixed this 20th day of March, A. D., 1950, at Washington, D. C.

[Seal]

LEON M. FUQUAY
Secretary

[fol. 23] BEFORE THE FEDERAL POWER COMMISSION

Executed Copy

Project No. 1975

APPLICATION FOR LICENSE

1. Idaho Power Company, a corporation organized under the laws of the State of Maine, and having its office and principal place of business at Boise, in the State of Idaho, hereby makes application to the Federal Power Commission for a license to authorize the construction, operation and maintenance of certain project works fully described herein.

2. The name, title and post-office address of the person to whom correspondence in regard to this application shall be addressed is as follows:

Leighton and Gamble
National Savings and Trust Building
Washington 5, D. C.

The Commission is also respectfully requested to mail copies of all correspondence in regard to this application directly to

A. C. Inman
Secretary, Idaho Power Company
1220 Idaho Street
Boise, Idaho

3. The applicant is a corporation and is organized under the following laws: Organized under the laws of the State of Maine; qualified and doing business in and under the laws of the States of Idaho, Oregon and Nevada.

4. The measure of control or ownership exercised by the applicant in any other organization or over applicant by any other organization is as follows: None.

5. The applicant operates in the following states: Idaho, Oregon and Nevada.

[fol. 24] 6. A concise general description of the project and the principal project works is as follows:

The project, to be known as the Bliss Power Plant, will include a dam across Snake River of a height sufficient to provide a top reservoir elevation of approximately 2736,* backing the water up to the Lower Salmon (Project 457) power plant tailrace, a distance of approximately ten miles. Four vertical water wheel driven units of approximately 25,000 kw capacity will be installed, providing a total capacity of about 100,000 kw.

(a) Dams and Reservoirs—The dam will be of concrete. The reservoir formed by the dam will be fluctuated approximately five feet, to provide for daily fluctuations of load at a load factor of between 60 and 70 per cent.

(b) Water Conduits—No water conduits will be required except those necessary to bring the water from the forebay to the turbine scroll case.

(c) Powerhouses, Substations, and Switchyards—The powerhouse will consist of a reinforced concrete substructure supporting four semi-outdoor type generators. A gantry crane will be provided for assembling and dismantling of units. Step-up transformers will be mounted on the power plant structure. The switchyard will be erected on the bench land immediately above the powerhouse site.

(d) Transmission Lines—The plant will be connected by tap line to the Company's 138-kv transmission network.

7. The location of the project applied for is as follows:

(a) In the State of Idaho.

(b) In the Counties of Gooding and Twin Falls.

(c) On the following named stream—Snake River, carrying commerce to the following extent: None.

(d) In the region of the following named cities and towns: Approximately 3 miles westerly of the village of Bliss, Idaho; between the cities of Glenns Ferry and Gooding, Idaho.

* Lr. M.O.L. 8/29/47 RDH

FACSIMILE

[redacted]

6. A concise general description of the project and the principal project works is as follows:

The project, to be known as the Bliss Power Plant, will include a dam across Snake River of a height sufficient to provide a top reservoir elevation of approximately 2736, backing the water up to the Lower Salmon (Project 457) power plant tailrace, a distance of approximately ten miles. Four vertical water wheel driven units of approximately 25,000 kw capacity will be installed, providing a total capacity of about 100,000 kw.

(a) Dams and Reservoirs - The dam will be of concrete. The reservoir formed by the dam will be fluctuated approximately five feet, to provide for daily fluctuations of load at a load factor of between 60 and 70 per cent.

(b) Water Conduits - No water conduits will be required except those necessary to bring the water from the forebay to the turbine scroll case.

(c) Powerhouses, Substations, and Switchyards - The powerhouse will consist of a reinforced concrete substructure supporting four semi-outdoor type generators. A gantry crane will be provided for assembling and dismantling of units. Step-up transformers will be mounted on the power plant structure. The switchyard will be erected on the bench land immediately above the powerhouse site.

(d) Transmission Lines - The plant will be connected by tap line to the Company's 138-kv transmission network.

7. The location of the project applied for is as follows:

(a) In the State of Idaho.

(b) In the Counties of Gooding and Twin Falls.

(c) On the following named stream - Snake River, carrying commerce to the following extent: None.

(d) In the region of the following named cities and towns: Approximately 3 miles westerly of the village of Bliss, Idaho; between the cities of Glenns Ferry and Gooding, Idaho.

[fol. 25] 8. Lands of the United States which will be affected are located in public domain.

9. The proposed scheme of development for the project is as follows:

See Item 6, above. Concrete dam across Snake River, with adjacent power plant structure housing four vertical water wheel driven generators of approximately 25,000 KW each, aggregating 100,000 KW of total installed capacity. Water will be discharged into main channel of Snake River from and immediately below power plant. Power available 90% of the time is estimated at 75,000 horsepower (56,000 KW).

Applicant desires to begin construction of dam and powerhouse in 1947, so that first two units will be completed for operation during summer of 1950. Present plans are for installation of third and fourth units during 1951-1952, for operation during summer of 1952. Conditions of load growth may hasten or retard installation of last two units.

10. The proposed use or market for the power to be developed is as follows:

Applicant is a public utility and subject to regulation by the regulatory authorities in all states in which applicant operates, namely, Idaho, Oregon and Nevada. Power will be distributed for residential, farm, commercial, industrial, municipal, public utility and interchange uses and purposes on and through the interconnected system of applicant. See map, Exhibit P.

[fol. 26] 11. The location, a brief description, and capacity of all power plants owned or operated by the applicant, the markets supplied thereby, and the relation thereof to the project applied for are briefly described as follows:

For locations of power plants and markets supplied thereby, see map, Exhibit P, filed herewith. Further information con-

cerning power plants comprising applicant's interconnected system is as follows:

Power Plants	Approximate Location	Installed Capacity-KW	Ultimate Capacity-KW	Source of Water
Existing				
American Falls	Power Co., Idaho	27,000	27,000	Snake River
Twin Falls	Twin Falls Co., Idaho	9,375	13,500	" "
Shoshone Falls	Jerome Co., Idaho	12,500	12,500	" "
Clear Lake	Gooding Co., Idaho	2,100	3,500	Clear Lake Springs
Thousand Springs	Gooding Co., Idaho	7,500	7,500	Thousand Springs
Upper Salmon	Twin Falls Co., Idaho	34,500*	34,500	Snake River
Lower Salmon	Gooding Co., Idaho	7,200	60,000	" "
Lower Malad	Gooding Co., Idaho	5,000	13,500	Malad Springs
Swan Falls	Ada County, Idaho	11,000	11,000	Snake River
Oxbow	Baker Co., Oregon	600	140,000	" "
Horseshoe Bend	Boise County, Idaho	1,800	1,800	Fayette River
Barber	Ada County, Idaho	1,050	1,050	Boise River
Cascade	Valley Co., Idaho	300	300	Fayette River
Bellevue	Blaine Co., Idaho	600	600	Wood River
Total Installed Capacity		120,525		

* Includes one 8250 KW unit to be in operation in August, 1947, and one 8250 KW unit to be in operation in September, 1947.

Under Construction				
Lower Salmon	Gooding Co., Idaho	52,800	60,000	Snake River
Lower Malad	Gooding Co., Idaho	8,500	13,500	Malad Springs
Upper Malad	Gooding Co., Idaho	7,200	7,200	" "
Total Under Construction		68,500		

The Company has interconnections, through transmission lines, with the systems of California-Pacific Utilities Company at Baker, Oregon; U S Bureau of Reclamation at Emmett, Barber, and Minidoka, all in Idaho; and Utah Power & Light Company at Blackfoot, Pocatello, and American Falls, also all in Idaho.

[fol. 27] 12. The following exhibits are hereby made a part of this application:

Exhibit A —Consisting of the following documents, as now filed with the Commission as Exhibit A in applicant's application for preliminary permit—Oxbow development (Project No. 1971):
Articles of Incorporation, with amendments to date.
By-laws, as amended to date.
Certificate of Organization.
Certificate of Good Standing—Idaho.

Exhibit B —Certified copy of resolution of Board of Directors authorizing filing of application.

Exhibit C-D-E —Statement pertaining to water rights.

Exhibit F —Statement pertaining to project lands.

Exhibit G —Statement of applicant's financial ability.

Exhibit H —Statement of project operation on stream flow.

Exhibit I —Statement of system capacity.

Exhibit J —General map of project area.

Exhibit K —Detail map of project area.

Exhibit L —General design drawings.

Exhibit M —General description and specifications of equipment.

Exhibit N —Estimate of project cost.

Exhibit O —Statement of time for constructing project works.

Exhibit P —Map of applicant's system.

[fol. 28] IN WITNESS WHEREOF the applicant has caused its name to be hereunto signed by C J Strike, its President, and its corporate seal to be hereto affixed by A C Inman, its Secretary, thereunto duly authorized, this 13th day of August, 1947.

IDAHO POWER COMPANY
By (Sgd) C. J. STRIKE
President.

(Corporate Seal)
Attest:

(Sgd) A. C. INMAN
Secretary.

Duly sworn to by C. J. Strike, jurat omitted in printing.

[fol. 29] BEFORE THE FEDERAL POWER COMMISSION

Project No. 1975—Idaho Sep 16 1947

Honorable C. A. Robins
Governor of Idaho
Boise, Idaho

My dear Governor Robins:

Pursuant to the provisions of Part I of the Federal Power Act, you are hereby notified that Idaho Power Company, of Boise, Idaho, has filed with this Commission an application for license for a proposed water-power project (No. 1975), which would be located on Snake River in Gooding and Twin Falls Counties, Idaho, and would affect public lands of the United States.

The proposed project, to be known as the Bliss project, would consist of a concrete dam in section 9, T. 6 S., R. 12 E., Boise meridian, creating a reservoir having maximum pool elevation of approximately 2,736 feet and extending upstream to the tailrace of the Lower Salmon power project (No. 457), a distance of about 10 miles; a powerhouse with installed capacity of about 134,000 horsepower in four units of equal size; a switchyard; two 138,000-volt tie lines connecting with the applicant's Hagerman Valley-Boise and Hagerman Valley-Caldwell transmission lines; and appurtenant works. The applicant proposes to distribute the energy generated through its interconnected system for public-utility purposes.

Any objection to this application or request for a hearing thereon, together with any briefs or other data of which consideration is desired, should be submitted to the Commission on or before November 4, 1947.

Very truly yours,

J. H. GUTRIDE
Acting Secretary

Registered
ARH:ejp
9-5-47

cc: Governor Robins
San Francisco Regional Office
Commissioner Draper
Bureau of Law
Licensed Projects Division
Mr. Hook

FACSIMILE

Project No. 1975 - Idaho

443310

SEP 26 1947

Honorable C. A. Robins
Governor of Idaho
Boise, Idaho

My dear Governor Robins:

Pursuant to the provisions of Part I of the Federal Power Act, you are hereby notified that Idaho Power Company, of Boise, Idaho, has filed with this Commission an application for license for a proposed water-power project (No. 1975), which would be located on Snake River in Gooding and Twin Falls Counties, Idaho, and would affect public lands of the United States.

The proposed project, to be known as the Milner project, would consist of a concrete dam in section 9, T. 6 S., R. 19 E., Boise meridian, creating a reservoir having maximum pool elevation of approximately 2,736 feet and extending upstream to the tailrace of the Lower Salmon power project (No. 457), a distance of about 10 miles; a powerhouse with installed capacity of about 134,000 horsepower in four units of equal size; a switchyard; two 138,000-volt tie lines connecting with the applicant's Hagerman Valley-Boise and Hagerman Valley-Caldwell transmission lines; and appurtenant works. The applicant proposes to distribute the energy generated through its interconnected system for public-utility purposes.

Any objection to this application or request for a hearing thereon, together with any briefs or other data of which consideration is desired, should be submitted to the Commission on or before November 4, 1947.

Very truly yours,

J. H. Gutride
Acting Secretary

Registered

AHG:cjp
9-5-47

cc: Governor Robins
San Francisco Regional Office
Commissioner Draper
Bureau of Law
Licensed Projects Division
Mrs. Hoak

[fol. 30] Project No. 1975—Idaho

Letter to Honorable C. A. Robins, Governor of Idaho
Identical letters sent to the following: (Registered)

Department of Reclamation—443311
State House
Boise, Idaho

Chairman, Board of County Commissioners—443312
Gooding County
Gooding, Idaho

Chairman, Board of County Commissioners—443313
Twin Falls County
Twin Falls, Idaho

The Mayor—443314
Gooding
Idaho

The Mayor—443315
Twin Falls
Idaho

Columbia Basin Commission, State of Washington—443316
Ephrata
Washington

Division of Water Resources—443317
Department of Conservation and Development
Olympia, Washington.

Hydroelectric Commission of Oregon—443318
Salem, Oregon

Department of Fish and Game—443319
State of Idaho
Boise, Idaho

[fol. 31] Before the Federal Power Commission

In the Matter of Idaho Power Company

Project No. 1975

September 19, 1947

Notice of Application for Major License

Public notice is hereby given, pursuant to the provisions of the Federal Power Act (16 U.S.C. 791-825r), that Idaho Power Company, of Boise, Idaho, has made application for license for pro-

posed major project No. 1975 (Bliss) on the Snake River, in Gooding and Twin Falls Counties, Idaho, consisting of a concrete dam in section 9, T. 6 S., R. 12 E., Boise meridian, creating a reservoir having maximum pool elevation of approximately 2,736 feet and extending upstream to the tailrace of the Lower Salmon power project (No. 457), a distance of about 10 miles; a powerhouse with installed capacity of about 134,000 horsepower in four units of equal size; a switchyard; two 138,000-volt tie lines connecting with the applicant's Hagerman Valley-Boise and Hagerman-Caldwell transmission lines; and appurtenant works.

Any protest against the approval of this application or request for hearing thereon, with the reasons for such protest or request and the name and address of the party or parties so protesting or requesting, should be submitted before November 4, 1947, to the Federal Power Commission, at Washington, D. C.

J. H. GUTRIDE
Acting Secretary.

This is certified to be a true copy of the original.

(S.) J. H. GUTRIDE

[fol. 32] BEFORE THE FEDERAL POWER COMMISSION

AMENDMENTS TO APPLICATION FOR LICENSE

Project No. 1975

Idaho Power Company, applicant for license for major project (No. 1975—Bliss, Idaho), amends and supplements its application for license, filed on August 22, 1947, in respect of Items 6, 7 (d) and 9, and Exhibits H, I, J, K, L, M, N and O, as hereinafter set forth:

6. A concise general description of the project and the principal project works is as follows:

The project, to be known as Bliss Power Plant, will include a dam across the Snake River, situated in the Northeast Quarter of the Southeast Quarter of Section 7, Township 6 South, Range 12 East, Boise Meridian, of a height sufficient to provide a top reservoir elevation of approximately 2654 [0] backing the water up to a point approximately one-fourth of a mile downstream from the Bliss bridge, or to a point near the east boundary of Section 12, Township 6 South, Range 12 East, Boise Meridian, a distance of about five miles. Three vertical water wheel drive units, of approximately 23,000-kw capacity each, will be installed with provision for a fourth unit which may be installed at a later date.

(a) Dams and Reservoirs—The dam will be of concrete with four 39′ x 34′ and one 10′ x 34′ spillway gates, or the equivalent, to handle surplus water flows during flood periods. The reservoir formed by the dam will be fluctuated approximately 4 feet to provide for daily fluctuations of load at a load factor of approximately 60 per cent. The operation of this reservoir will be coordinated with the operation of the reservoir at the Lower Salmon power development (Project 457).

(b) Water Conduits—No water conduits will be required except those necessary to bring the water from the forebay to the turbine scroll case through the seawall of the power plant.

(c) Power Houses, Substations, and Switchyards—The powerhouse will consist of a reinforced concrete structure supporting three semi-outdoor type generators. The gantry crane will be provided for assembling and dismantling of units. Step-up transformers will be mounted on the power plant structure. The switchyard will be erected on the bench land immediately above the powerhouse site.

(d) Transmission Lines—The plant will be connected by tap lines to the Company's 138-kv transmission network.

[0] Correction made 12/10/47

FACSIMILE

BEFORE THE

FEDERAL POWER COMMISSION

FPC-2 FORM

Amendments to

APPLICATION FOR LICENSE

Project No 1975

FEDERAL POWER COMMISSION
DOCKETED
DEC 3 1947
RECORDS SECTION
SECRETARY'S OFFICE

Dec. 3 7 11 12

Idaho Power Company, applicant for license for major project (No 1975 Bliss, Idaho), amends and supplements its application for license, filed on August 22, 1947, in respect of Items 6, 7 (d) and 9, and Exhibits H, I, J, K, L, M, N and O, as hereinafter set forth:

6. A concise general description of the project and the principal project works is as follows:

The project, to be known as Bliss Power Plant, will include a dam across the Snake River, situated in the Northeast Quarter of the Southeast Quarter of Section 7, Township 6 South, Range 12 East, Boise Meridian, of a height sufficient to provide a top reservoir elevation of approximately [redacted], backing the water up to a point approximately one-fourth of a mile downstream from the Bliss bridge, or to a point near the east boundary of Section 12, Township 6 South, Range 12 East, Boise Meridian, a distance of about five miles. Three vertical water wheel driven units, of approximately 23,000-kw capacity each, will be installed with provision for a fourth unit which may be installed at a later date

(a) Dams and Reservoirs - The dam will be of concrete with four 39' x 34' and one 10' x 34' spillway gates, or the equivalent, to handle surplus water flows during flood periods. The reservoir formed by the dam will be fluctuated approximately 4 feet to provide for daily fluctuations of load at a load factor of approximately 60 per cent. The operation of this reservoir will be coordinated with the operation of the reservoir at the Lower Salmon power development (Project 457)

(b) Water Conduits - No water conduits will be required except those necessary to bring the water from the forebay to the turbine scroll case through the seawall of the power plant.

(c) Power Houses, Substations, and Switchyards - The powerhouse will consist of a reinforced concrete structure supporting three semi-outdoor type generators. The gantry crane will be provided for assembling and dismantling of units. Step-up transformers will be mounted on the power plant structure. The switchyard will be erected on the bench land immediately above the powerhouse site.

(d) Transmission Lines - The plant will be connected by tap lines to the Company's 138-kv transmission network.

Changed to 7(d) per telephone conversation made 12/4/47

[fol. 38] 7. The location of the project applied for is as follows:

(d) In the region of the following named cities and towns: Approximately six miles westerly of the Village of Bliss, Idaho, between the cities of Glenns Ferry and Gooding, Idaho.

9. The proposed scheme of development for the project is as follows:

See Item 6 above. Concrete dam across Snake River with adjacent power plant structure housing three vertical water wheel driven generators, with approximately 23,000-kw capacity each, aggregating 69,000 kw of total installed capacity. Provision will be made for the future installation of a fourth unit. The power plant structure will form a portion of the dam across the Snake River channel. Water will be taken from the Snake River, passed immediately through the power plant and discharged again into the Snake River below the dam. Power available 90 per cent of the time is estimated at 35,500 kw, or 47,500 hp.

Applicant desires to begin construction of dam and powerhouse as soon as possible so that the power plant may be placed in service by autumn of 1949. Anticipated load increases are such as to make it essential that the plant be completed and in operation not later than the winter of 1949-50. Pre-license consent for immediate construction of project works is respectfully requested.

The following exhibits are filed herewith and hereby made a part of said application for license, Project 1975:

Exhibit H (amended)	—Statement of project operation on stream flow.
Exhibit I (amended)	—Statement of system capacity (geological statement and report attached).
Exhibit J (amended)	—General map of project area (Drawing No. E-7154).
Exhibit K	—Detail map of project area (Drawing No. E-7155, 3 sheets).
Exhibit L	—General design drawings (Drawing No. E-7156, 3 sheets).
Exhibit M (amended)	—General description and specifications of equipment.
Exhibit N (amended)	—Estimate of project cost.
Exhibit O (amended)	—Statement of time for constructing project works.

FACSIMILE

7 The location of the project applied for is as follows:

(d) In the region or the following named cities and towns: Approximately six miles westerly of the Village of Bliss, Idaho, between the cities of Glenns Ferry and Gooding, Idaho.

changed by ofpl. filed 8/20/29

9 The proposed scheme of development for the project is as follows:

See Item 6 above. Concrete dam across Snake River with adjacent power plant structure housing three vertical water wheel driven generators with approximately 23,000-kw capacity each, aggregating 69,000 kw of total installed capacity. Provision will be made for the future installation of a fourth unit. The power plant structure will form a portion of the dam across the Snake River channel. Water will be taken from the Snake River, passed immediately through the power plant and discharged again into the Snake River below the dam. Power available 90 per cent of the time is estimated at 35,500 kw, or 47,900 hp

Applicant desires to begin construction of dam and powerhouse as soon as possible so that the power plant may be placed in service by autumn of 1949. Anticipated load increases are such as to make it essential that the plant be completed and in operation not later than the winter of 1949-50. Pre-license consent for immediate construction of project works is respectfully requested.

The following exhibits are filed herewith and hereby made a part of said application for license, Project 1975:

Exhibit H (amended) - Statement of project operation on stream flow.

Exhibit I (amended) - Statement of system capacity (geological statement and report attached).

Exhibit J (amended) - General map of project area (Drawing No E-7154).

Exhibit K - Detail map of project area (Drawing No E-7155, 3 sheets)

Exhibit L - General design drawings (Drawing No E-7156, 3 sheets).

Exhibit M (amended) - General description and specifications of equipment

Exhibit N (amended) - Estimate of project cost

Exhibit O (amended) - Statement of time for constructing project works

[fol. 34] IN WITNESS WHEREOF, the applicant has caused its name to be hereunto signed by T E Roach, its Vice-President, and its corporate seal to be hereto affixed by A C Inman, its Secretary, thereunto duly authorized, this 17th day of November, 1947.

IDAHO POWER COMPANY
By (Sgd) T. E. ROACH
Vice-President

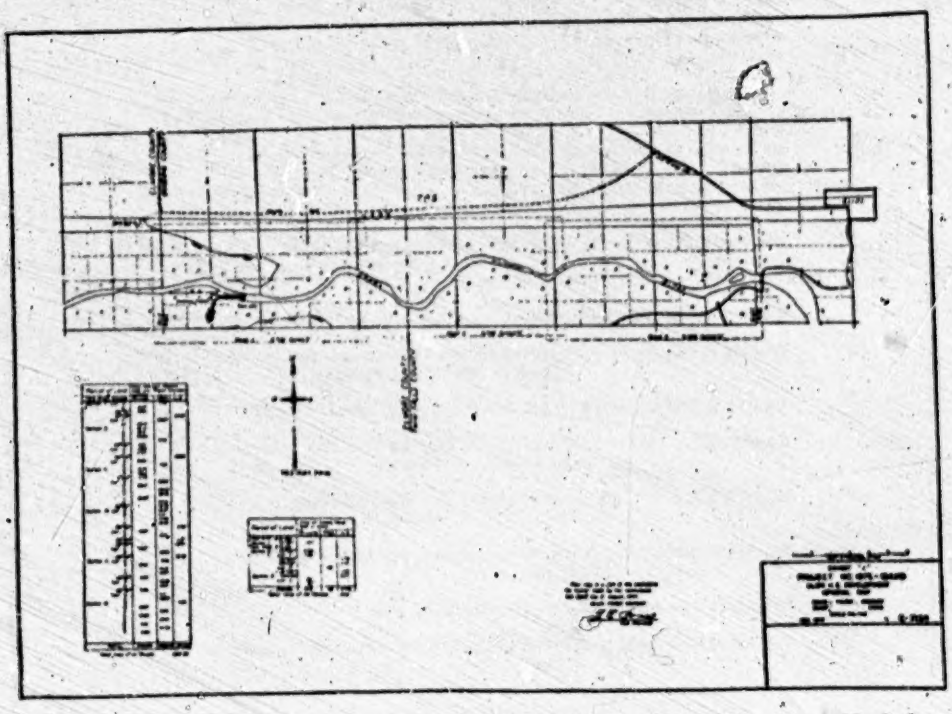
(Corporate Seal)
Attest:
(Sgd) A. C. INMAN
Secretary

Duly sworn to by T. E. Roach, jurat omitted in printing.

[fol. 35] EXHIBIT J TO APPLICATION
(amended)

GENERAL MAP OF PROJECT AREA

A general map (Drawing No E-7154) covering the entire project area is separately filed as a part of this application.



This statement is a part of the application for license filed by the undersigned on August 22, 1947.

IDAHO POWER COMPANY
By (Sgd) T. E. ROACH
Vice-President.

[fol. 37]

EXHIBIT N TO APPLICATION
(Amended)

ESTIMATE OF PROJECT COST

The following is an estimate of the cost of the proposed development as prepared by Company engineers. This estimate is subject to change as detailed designs are completed and equipment prices obtained.

Land and Land Rights	$ 75,000
Structures and Improvements	2,500,000
Reservoirs, Dam, and Waterways	4,075,000
Turbines and Generators	3,250,000
Accessory Electrical Equipment	200,000
Miscellaneous Power Plant Equipment	25,000
Roads, Trails, and Bridges	200,000
Transmission Substation Equipment	600,000
Communication Equipment	25,000
Engineering and Miscellaneous Overheads—15%	1,645,000
Total	$12,595,000

This statement is a part of the application for license filed by the undersigned on August 22, 1947.

Cameraman's Note:

This is poor copy, but is the best obtainable.

IDAHO POWER COMPANY
By (Sgd) T. E. ROACH
Vice-President.

[fol. 38] BEFORE THE FEDERAL POWER COMMISSION

Project No. 1975—Idaho

Dec 22 1947

The Honorable
The Secretary of the Interior
Washington, D. C.

Dear Sir:

Idaho Power Company, of Boise, Idaho, has filed with this Commission an application for a license for a proposed power project (No. 1975) on Snake River in Elmore, Twin Falls, and Gooding Counties, Idaho, affecting public lands of the United States.

The proposed project, to be known as the Bliss project, would consist of a concrete dam in lots 5 and 10, section 7, T. 6 S., R. 12 E., Boise meridian, creating a reservoir with maximum pool elevation of approximately 2,654 feet extending upstream about 5 miles to a point approximately one-fourth mile downstream from the Bliss bridge; a powerhouse integral with the dam with initial installation of approximately 69,000 kilowatts in three units and provision for future installation of a fourth unit; transformers; a switchyard; transmission lines connecting with the company's 138-kilovolt transmission system; and appurtenant works.

One copy of the incomplete application filed August 22, 1947, exclusive of Exhibit J, and one copy of the amendment filed December 3, 1947, including one print of each of the exhibits listed below, are inclosed:

Exhibit J (Revised) (F.P.C. No. 1975-2)

Exhibit K, Sheets, 1, 2, and 3 (F.P.C. Nos. 1975-3, 4, and 5)

Exhibit L, Sheet 1 (F.P.C. No. 1975-6)

In accordance with the provisions of section 4(e) of the Federal Power Act, you are invited to report whether the license, if issued,

would interfere or be inconsistent with the purpose for which any reservation under your supervision was created or acquired, and to state the conditions which are deemed necessary for the adequate protection and utilization of any such reservation.

It is requested that you give the Commission your views as to the measures which should be taken to protect wildlife resources in connection with the project in accordance with the provisions of Public Law 732, 79th Congress, 2d session, approved August 14, 1946. Your advice concerning fishways is also requested pursuant to the provisions of section 18 of the Federal Power Act, 16 U.S.C. 811.

You are also invited to report otherwise on the application to the extent that you may deem desirable.

If no response is received within 90 days from the date of this letter, it will be assumed that you do not desire to submit any comments.

Very truly yours,

J. H. GUTRIDE,
Acting Secretary

3 Inclosures:

No. 24484—Copy of application filed 8/22/47

No. 24485—Copy of amendment filed 12/3/47

No. 24486—Five prints

LP

ARH/ea & arh

12/15/47

cc: Secretary of the Interior
U. S. Geological Survey
Bureau of Reclamation
Fish and Wildlife Service
San Francisco Regional Office
Commissioner Draper
Bureau of Law
Division of Licensed Projects

FACSIMILE

Letter to The Secretary of the Interior Page 2

It is requested that you give the Commission your views as to the measures which should be taken to protect wildlife resources in connection with the project in accordance with the provisions of Public Law 732, 79th Congress, 2d session, approved August 14, 1946. Your advice concerning fisheries is also requested pursuant to the provisions of section 18 of the Federal Power Act, 16 U.S.C. 811.

You are also invited to report otherwise on the application to the extent that you may deem desirable.

If no response is received within 90 days from the date of this letter, it will be assumed that you do not desire to submit any comments.

Very truly yours,

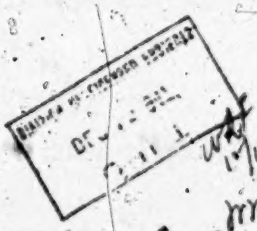
J. H. Gutride

Acting Secretary

3 Enclosures:
No. 2444 - Copy of application filed 8/22/47
No. 2445 - " " amendment " 12/3/47
No. 2446 - Five prints

LP
AEH/ss & enc
12/15/47

cc: Secretary of the Interior
U. S. Geological Survey
Bureau of Reclamation
Fish and Wildlife Service
San Francisco Regional Office
Commissioner Draper
Bureau of Law
Division of Licensed Projects



[fol. 40] BEFORE THE FEDERAL POWER COMMISSION

In the Matter of Idaho Power Company

Project No. 1975

December 26, 1947

NOTICE OF AMENDED APPLICATION FOR MAJOR LICENSE

Public notice is hereby given, pursuant to the provisions of the Federal Power Act (16 U.S.C. 791-825r), that Idaho Power Company, of Boise, Idaho, has amended its application for license for proposed major Project No. 1975 (Bliss). The project as now proposed will be located on the Snake River, in Elmore, Gooding, and Twin Falls Counties, Idaho, and will consist of a concrete dam in lots 5 and 10, section 7, T. 6 S., R. 12 E., Boise meridian (about 2 miles downstream from the site originally proposed), creating a reservoir with maximum pool elevation of approximately 2,654 feet extending upstream about 5 miles to a point approximately one-fourth mile downstream from the Bliss bridge; a powerhouse integral with the dam with initial installation of approximately 69,000 kilowatts in three units and provision for future installation of a fourth unit; transformers; a switchyard; transmission lines connecting with the company's 138-kilovolt transmission system; and appurtenant works.

Any protest against the approval of this application or request for hearing thereon, with the reasons for such protest or request and the name and address of the party or parties so protesting or requesting, should be submitted before January 29, 1948, to the Federal Power Commission, Washington 25, D. C.

J. H. GUTRIDE,
Acting Secretary.

This is certified to be a true copy of the original.
J. H. GUTRIDE

[fol. 41] Proj. No. 1975

EXHIBIT F
(Revised)

STATEMENT PERTAINING TO PROJECT LANDS

As to lands other than those owned by the United States necessary for carrying out the project covered by the application, applicant intends to obtain suitable easements, or occupancy or flood-

ing rights. Present information indicates ownerships of lands within the proposed project area are as shown on the following list:

IDAHO

									Owner-ship	
Lots 4 and 5	Sec	7	Twp	6	S	Rge	12	E	BM	US-PSR
Lots 6, 10 and NE¼SW¼ SE¼	"	7	"	6	S	"	12	E	"	Private
Lots 1, 2, 3, 4, 6 and 7	"	8	"	6	S	"	12	E	"	Private
Lots 5 and 8	"	8	"	6	S	"	12	E	"	US-PSR
Lots 1, 2, 3, 8 and SE¼ NW¼	"	9	"	6	S	"	12	E	"	Private
Lots 4, 5, 6, 7 and SE¼ SE¼	"	9	"	6	S	"	12	E	"	US-PSR
Lots 2 and 3	"	10	"	6	S	"	12	E	"	Private
Lots 1, 4, 5, 6, 7 and 8	"	10	"	6	S	"	12	E	"	US-PSR
S½SW¼SW¼SE¼ and NE¼SW¼	"	10	"	6	S	"	12	E	"	US-Vac'nt
Lot 7, NW¼SE¼ and NE¼SW¼	"	11	"	6	S	"	12	E	"	Private
Lots 1, 2, 3, 4, 5, 6 and 8	"	11	"	6	S	"	12	E	"	US-PSR
Lots 6, 7, 8 and 9	"	12	"	6	S	"	12	E	"	Private
Lots 2, 3 and 4	"	12	"	6	S	"	12	E	"	US-PSR
Lot 5	"	12	"	6	S	"	12	E	"	US-Vac'nt

This statement is a part of the application for license made by the undersigned on the 13th day of August, 1947.

IDAHO POWER COMPANY
By (Sgd) A. C. INMAN
Vice President

[fol. 42] BEFORE THE FEDERAL POWER COMMISSION

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF THE SECRETARY

WASHINGTON 25, D. C.

Feb 19 1948

My dear Mr. Smith:

Reference is made to your letter of December 22, 1947, requesting a report in connection with the application of the Idaho Power Company of Boise, Idaho, for a license for a proposed power project (No. 1975-Idaho) on Snake River in Elmore, Twin Falls, and Gooding Counties, Idaho, and affecting public lands of the United States.

The recommendations of the Department as to measures which should be taken to protect fish and wildlife resources can not be made pending a report from the Fish and Wildlife Service. This

report is expected to be completed by about March 22, 1948, at which time you will be advised thereof.

In view of your request, however, that the report on this application be expedited, I am submitting the views of the Department on features other than fish and wildlife resources

The Geological Survey reports that the construction and use of the project would not affect adversely the purposes of any withdrawal or classification recommended by the Survey, deposits of coal or other minerals, or land within the known geologic structure of a producing oil or gas field, and that the land affected by the application does not contain substantial deposits of fissionable materials as defined in Executive Order 9701.

Possible stream gaging requirements indicated by the nature of the project are under consideration by the Geological Survey and will be attended to by direct communication with the Federal Power Commission.

The National Park Service advises that issuance of the proposed license will not interfere or be inconsistent with the interests of the National Park Service. Likewise, the Bonneville Power Administration advises that it will interpose no objection to the granting of the license.

The Bureau of Reclamation and other agencies in the Department have considered the proposed project in the light of irrigation and conservation programs and are of the opinion that possible conflicts may develop. However, because of the acute power shortage in southern Idaho, decision has been reached not to oppose the granting of this license since it is recognized that the project, if constructed promptly, would relieve the power shortage in the southern Idaho area.

It is felt, however, that if the Federal Power Commission issues a license for the project, the following provisions should be included therein:

(1) That the license be conditioned upon the applicant's starting construction work within one year from the date of issue of the license and upon completing construction of at least the initial [fol. 43] generating unit together with the necessary transmission lines and appurtenant works within five years of the date of the license.

(2) That, should the applicant determine it is damaged by subsequent upstream diversion of water by the United States in connection with its irrigation and conservation program, then the

United States Government has the option, in full settlement of any and all claims by the applicant,

(a) of paying such damages as the applicant shall be then entitled to recover as a matter of law; or

(b) of acquiring the applicant's plant at its depreciated cost.

The Department has no objection to the issuance of a license to the Idaho Power Company for its proposed Bliss Project, provided the recommendations above set forth are followed and provided further that full provision is made for the carrying out of the recommendations of the Fish and Wildlife Service which will be sent you at a later date.

Sincerely yours,

WILLIAM G. WARNER
Assistant Secretary of the Interior.

Hon. Nelson L. Smith,
Chairman, Federal Power Commission.

[fol. 44] BEFORE THE FEDERAL POWER COMMISSION

Before Commissioners: Nelson Lee Smith, Chairman; Claude L. Draper, Leland Olds and Harrington Wimberly.

March 2, 1948

In the Matter of Idaho Power Company

Project No. 1975

ORDER AUTHORIZING ISSUANCE OF LICENSE (MAJOR)

(1) An application was filed August 22, 1947, and later amended, by Idaho Power Company, of Boise, Idaho, for license under the Federal Power Act to authorize the construction, operation, and maintenance of a proposed major project, to be known as the Bliss development and designated as Project No. 1975, on the Snake River, in Elmore, Gooding, and Twin Falls Counties, Idaho, and affecting lands of the United States.

(2) The project consists of a concrete dam in lots 5 and 10, sec. 7, T. 6 S., R. 12 E., Boise meridian, creating a reservoir with maximum pool elevation of approximately 2,654 feet extending upstream about 5 miles to a point approximately one-fourth mile downstream from the Bliss bridge; a powerhouse integral with the dam with initial installation of approximately 69,000 kilowatts in three units and provision for future installation of

a fourth unit; transformers; a switchyard; transmission lines connecting with applicant's 138-kilovolt transmission system; and appurtenant works; and, exclusive of transmission facilities, occupies approximately 509.7 acres of lands of the United States in Elmore, Gooding, and Twin Falls Counties, Idaho.

(3) Although the application states that the powerhouse will be connected by tap lines to applicant's 138-kilovolt transmission network, neither the tap lines nor the switching station from which they emanate are shown to be within the project boundary on the maps submitted as part of the application.

(4) The Office of the Chief of Engineers has stated orally that the Division Engineer of the Corps of Engineers has reported favorably on the application.

(5) The Assistant Secretary of the Interior, acting for the Secretary of the Interior, has reported favorably on the application, subject to the imposition of conditions hereinafter provided for.

(6) The Public Utilities Commission of the State of Idaho has reported that it has no objection to the application.

[fol. 45] (7) The Department of Fish and Game of the State of Idaho has reported that it has no objection to the project.

(8) By letters dated September 30, 1947, and January 2, 1948, the Office of the Hydroelectric Commission of Oregon informed the Commission that the notices of the filing of the original application and of the amended application, respectively, would be called to the attention of that Commission at its next meeting. No further comment has been received.

(9) It is desirable to reserve for determination at a later date the question of what transmission facilities should be included in the license as part of the complete project.

The Commission, having considered the application and the project record, *finds* that:

(10) The applicant is a corporation organized under the laws of the State of Maine and has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project.

(11) No conflicting application is before the Commission.

(12) Public notice has been given as required by the Federal Power Act.

(13) The project does not affect any Government dam, nor will the issuance of a license therefor as hereinafter provided affect the development of any water resources for public purposes which should be undertaken by the United States itself.

(14) The issuance of a license as hereinafter provided will not interfere or be inconsistent with the purposes of any reservation or withdrawal of public lands of the United States.

(15) Under present circumstances and conditions and upon the terms hereinafter imposed, the project is best adapted to a comprehensive plan for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes.

(16) The horsepower capacity hereinafter authorized to be installed in the project is 130,000 horsepower, and the energy generated thereby will be used for public-utility purposes.

(17) In accordance with Section 10(d) of the Act, the rate of return upon the net investment in the project and the proportion of surplus earnings to be paid into and held in amortization reserves are reasonable as hereinafter specified.

[fol. 46] (18) The amount of annual charges to be paid under the license for the purpose of reimbursing the United States for the costs of administration of Part I of the Act, and for recompensing it for the use, occupancy, and enjoyment of its lands (exclusive of those used for transmission line right-of-way, if any) is reasonable as hereinafter fixed and specified; and the annual charge for recompensing the United States for the use, occupancy, and enjoyment of its lands used for transmission-line right-of-way, if any, shall be hereafter determined.

(19) The statement filed as part of the application and designated as Exhibit M (Amended) conforms to the Commission's rules and regulations and should be approved as part of the license for the project.

(20) The maps and plans filed as part of the application and designated as Exhibits J, K and L, respectively, need revision in regard to project area and design of structures, and Exhibit F filed as part of the application does not give full details as to the project lands.

(21) Exhibit F, statement of nature, extent, and ownership of land and land rights; Exhibit J, general map covering the entire project area; Exhibit K, detail map of project area;

and Exhibit L, general design drawings, should be revised in accordance with the Commission's rules and regulations, and filed as hereinafter provided.

It is *ordered* that:

(22) A license, effective as of the first day of the month in which it is executed, be issued to the applicant for a period of 50 years for the construction, operation, and maintenance of major Project No. 1975, subject to the provisions of the Federal Power Act, and the rules and regulations thereunder, and subject to approval by the Secretary of the Army and the Chief of Engineers of such plans of the project structures as may affect navigable capacity; provided that nothing in this order shall be construed as determining whether the Snake River is a navigable water of the United States at the site of the proposed project.

(23) The license contain the usual conditions and provisions for licenses issued under Section 4(e) of the Act for such projects and such conditions as may be prescribed hereafter in the interest of navigation, and the following special provisions:

(a) The Licensee shall commence construction of the project within one year from the date of issuance of the license and shall complete said construction for the operation of three generating units within three years from the date of issuance of the license.

[fol. 47] (b) At such time as the Commission may direct, provided that it is economically sound and in the public interest to do so, after notice and opportunity for hearing, the Licensee shall install the fourth generating unit.

(c) The Licensee shall file with the Commission, in accordance with the Commission's rules and regulations, revised Exhibit L before beginning construction of the project works shown thereon and revised Exhibits F, J, and K within one year from the date of issuance of the license for the Bliss development, including such transmission facilities which the Commission may determine to be properly a part of the project.

(d) The operation by the Licensee of the project works so far as such operation involves the use, storage, and discharge from storage of waters of the Snake River at this project, shall at all times be controlled by such reasonable rules and regulations as the Commission may prescribe for the protection of life, health, and property, and in the inter-

est of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes; and the Licensee shall release water from the project reservoir at such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the Commission may prescribe for the purposes hereinbefore mentioned.

(e) Should the project works be damaged or the power output of the project be reduced by subsequent upstream diversion of the waters of the Snake River by the United States in connection with its irrigation and conservation program, then the United States has the option, in full settlement of any and all claims by the Licensee, of paying such damages as the Licensee shall be then entitled to recover as a matter of law, or of acquiring the Licensee's project as provided by the Federal Power Act.

(f) The Licensee shall construct, maintain and operate such fish protective devices and shall comply with such special conditions in the interest of fish life and wildlife resources as may be prescribed hereafter upon the recommendations of the Secretary of the Interior; and

(g) The Commission reserves the right to determine at a later date what transmission facilities should be included in the license as part of the project.

[fol. 48] (24) The license provide that after the first 20 years of operation of the project under the license, six (6) per cent per annum shall be the specified rate of return on the net investment in the project for determining surplus earnings and for the establishment and maintenance of amortization reserves pursuant to Section 10(d) of the Act; one-half of all earnings in excess of six (6) per cent per annum shall be paid into such amortization reserves, and such amortization reserves shall be established, maintained, and disposed of in accordance with the terms of the Act and such rules, regulations, and orders of the Commission as may be adopted pursuant thereto.

(25) Subject to the provisions of Section 10(e) of the Act and the rules and regulations of the Commission thereunder, the licensee shall, effective as of the date of the license, pay to the United States the following annual charges:

(a) For the purpose of reimbursing the United States for the costs of administration of Part I of the Act, one (1) cent

per horsepower on the capacity authorized to be installed (130,000 horsepower) plus two and one-half (2½) cents per 1,000 kilowatt-hours of gross energy generated by the project during the fiscal year ended June 30 of the calendar year for which the charge is made;

(b) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of its lands (exclusive of those used for transmission-line right-of-way, if any), $1,019.40; and

(c) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of its lands used for transmission-line right-of-way, if any, an amount to be hereafter determined.

(26) Exhibit M (Amended) specified in paragraph (19) above be and it is hereby approved as part of the license.

By the Commission.

LEON M. FUQUAY,
Secretary.

Date of Issuance March 3, 1948

[fol. 49] BEFORE THE FEDERAL POWER COMMISSION

Project No. 1975—Idaho Mar 18 1948

The Director

Bureau of Land Management

Department of the Interior

Washington 25, D. C.

Dear Sir:

In accordance with the provisions of Section 24 of the Act of June 10, 1920 (41 Stat. 1063), as amended by the Act of August 26, 1935, (49 Stat. 838), notice is hereby given that the lands of the United States hereinafter described are entirely or partly included in the project boundary of Project No. 1975 for which application for license has been filed by the Idaho Power Company, Boise, Idaho. Under said Section 24 the lands are, from December 3, 1947 the date of filing of amended application first describing the lands, reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by Congress or

by the Commission. The area reserved by the filing of this application is approximately 509.73 acres.

Boise, Meridian, Idaho

T. 6 S., R. 12 E., Sec. 7, lots 4, 5;

Sec. 8, lots 5, 8;

Sec. 9, lots 4, 5, 6, 7, $SE\frac{1}{4}SE\frac{1}{4}$;

Sec. 10, lots 1, 4, 5, 6, 7, 8, $SW\frac{1}{4}SE\frac{1}{4}$, $E\frac{1}{2}SW\frac{1}{4}$, $SW\frac{1}{4}SW\frac{1}{4}$;

Sec. 11, lots 1, 2, 3, 4, 5, 6, 8;

Sec. 12, lots 2, 3, 4, 5.

Also: All lands lying within 25 feet of the center line traverse of access road right-of-way in

T. 6 S., R. 12 E., Sec. 7, lot 4, $NW\frac{1}{4}NE\frac{1}{4}$, $SE\frac{1}{4}NE\frac{1}{4}$, $NE\frac{1}{4}NW\frac{1}{4}$;

Sec. 8, $SW\frac{1}{4}NW\frac{1}{4}$.

A photostatic copy of each of 4 sheets of the project map (FPC No. 1975-2, 3, 4 and 5) is transmitted herewith.

LP
MPD:ea
12-22-47

Very truly yours
LEON M. FUQUAY
Secretary

cc: Bureau of Land Management
San Francisco Regional Office
Bureau of Law
Division of Licensed Projects

Inclosures: 1 cc and Map (Incl. 24472) Bureau of Land Management

1 cc and Map (Incl. 24473) District Land Office, Blackfoot, Idaho

1 cc and Map (Incl. 24474) San Francisco Regional Office

2 cc and Map (Incl. 24475) Geological Survey

[fol. 50] BEFORE THE FEDERAL POWER COMMISSION

APPLICATION FOR SUPPLEMENTARY AMENDMENTS TO

APPLICATION FOR LICENSE

Project No. 1975

1. Idaho Power Company, a corporation organized under the laws of the State of Maine, and having its office and principal place of business at Boise, in the State of Idaho, filed with the Federal Power Commission, on August 22, 1947, an application for license under the Federal Power Act to authorize the construction, operation and maintenance of a proposed major project, to be known as the Bliss development and designated as Project No. 1975, on the Snake River in Elmore, Gooding and Twin Falls Counties, Idaho, and affecting lands of the United States.

2. On December 3, 1947, said applicant filed with said Commission an application for amendment to the above-mentioned application for license in respect of Items 6, 7(d) and 9, and Exhibits H, I, J, K, L, M, N and O thereof.

3. On March 2, 1948, the Federal Power Commission entered an Order responsive to both of aforesaid applications of Idaho Power Company, authorizing issuance of license (major) subject to certain terms and conditions as therein recited, among which was included Paragraph 23(g), reserving the right of said Commission "to determine at a later date what transmission facilities should be included in the license as part of the project".

4. Under "pre-license consent," for urgent reasons authorized by said Commission, applicant proceeded with certain construction work on the project, and during the progress thereof has given additional study to project details. Among the more important [fol. 51] features has been that of transmission facilities that should be included in license as a part of the project, as covered in said Paragraph 23(g) of the Commission's Order of March 2, 1948. As the formal license for Project No. 1975 has not been issued at date of this application, and because of the fact that the applicant has arrived at what it believes to be sound and reasonable conclusions as to project transmission facilities, it appears to the applicant desirable further to amend the application in order that the license, when issued, shall be as final and complete as it is possible to foresee. This application for amendment of application is therefore respectfully submitted.

5. Applicant hereby applies for the deletion of subparagraph (d)

of Paragraph numbered 6 of the aforesaid application filed December 3, 1947, and in place thereof to substitute the following:

(d) Transmission Lines—From the step-up of transformers and switchyard installed at the project power plant, as shown on revised Exhibit L hereof, two transmission circuits of 138-kv capacity shall be projected. One of these shall extend northwestwards, a distance of approximately 73 miles, to a point of junction with applicant's presently existing primary transmission system at a substation located near the City of Boise, Idaho. The second of said lines shall extend eastward, a distance of approximately 116 miles, to a point of junction with applicant's presently existing primary transmission system at a substation located near the City of American Falls, Idaho. Said lines will be located on privately owned and public lands, all as shown on revised Exhibits J and K hereof. These two transmission lines shall be included in license as a part of Project No. 1975.

6. Applicant hereby applies for the deletion of subparagraph (d) of Paragraph numbered 7 of the aforesaid application filed December 3, 1947, and in place thereof to substitute the following:

(d) In the region of the following named cities and towns:

Dam and power plant—Approximately six miles westerly of the Village of Bliss, Idaho, between the cities of Glenns Ferry and Gooding; Idaho.

Bliss-Boise transmission line—Bliss, Glenns Ferry, Mountain Home and Boise.

Bliss-American Falls transmission line—Bliss, Hagerman, Wendell, Minidoka, American Falls.

[fol. 52] The following revised exhibits are filed herewith and hereby made a part of said application for license, Project No. 1975:

Exhibit J (amended)—General maps of project area
(Drawing No. E-7154 and
Drawing No. E-7154A, 2 sheets).

Exhibit K (amended)—Detail maps of project area
(Drawing No. E-7155; 3 sheets, and
Drawing No. E-7155A, 4 sheets).

Exhibit L (amended)—General design drawings
(Drawing No. E-7156, 3 sheets, and
Drawing No. E-7156A).

Exhibit M (amended)—General description and specifications of equipment

Exhibit N (amended)—Estimate of project cost.

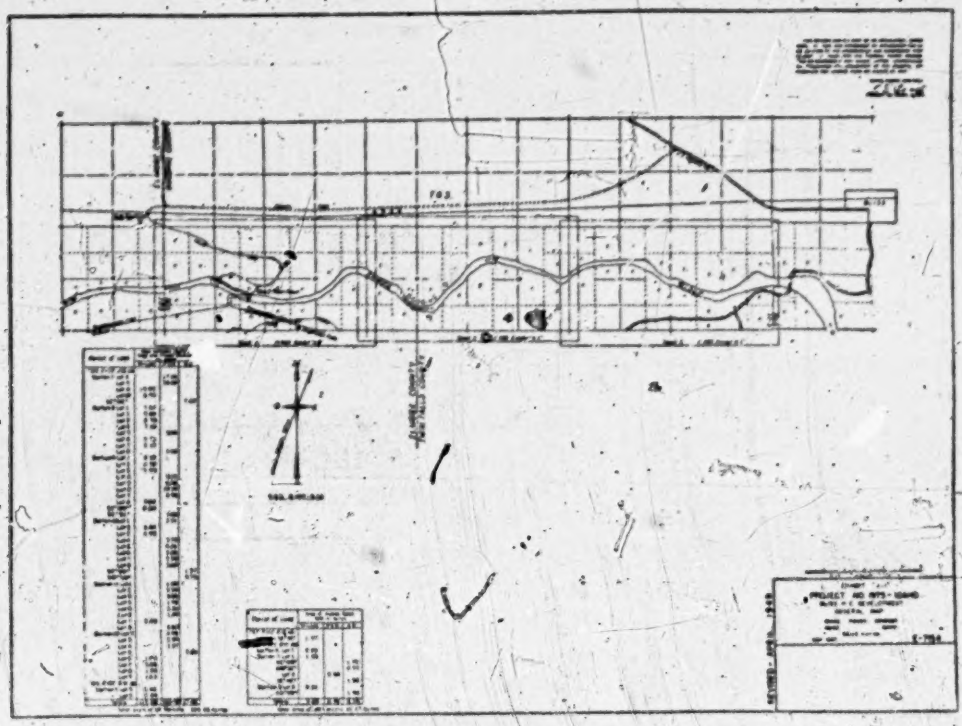
IN WITNESS WHEREOF, the applicant has caused its name to be hereunto signed by T. E. Roach, its President, and its corporate seal to be hereto affixed by E. A. Andersen, its Assistant Secretary, thereunto duly authorized this 15th day of April, 1949.

IDAHO POWER COMPANY
By (Sgd) T. E. ROACH
President

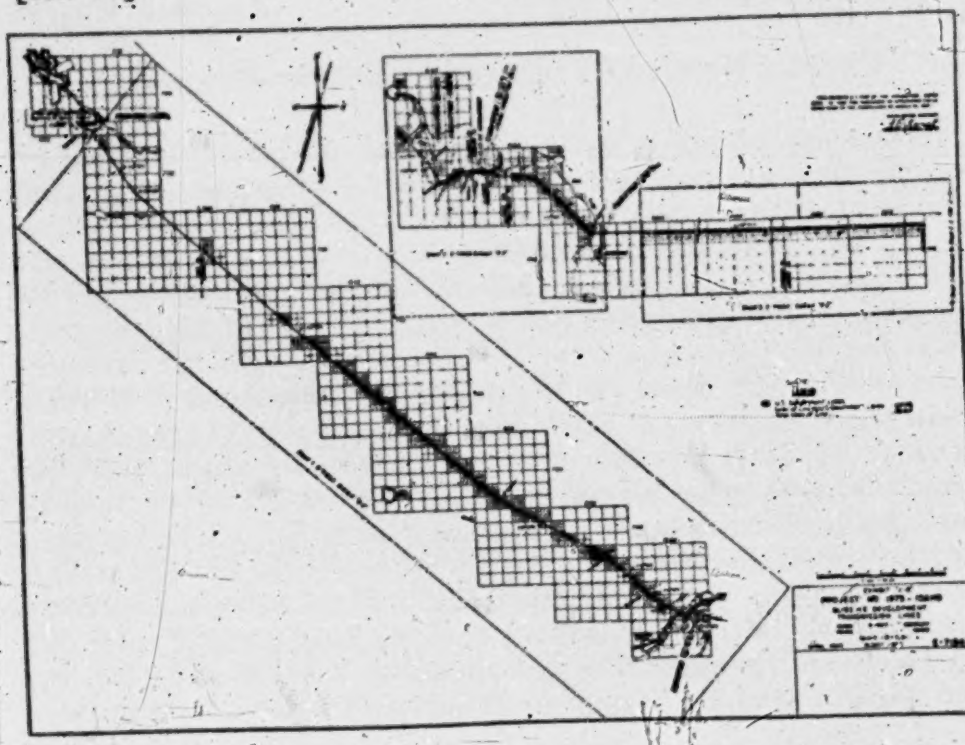
(Corporate Seal)
Attest: (Sgd.) E. A. ANDERSEN
Assistant Secretary.

Duly sworn to by T. E. Roach jurat omitted in printing.

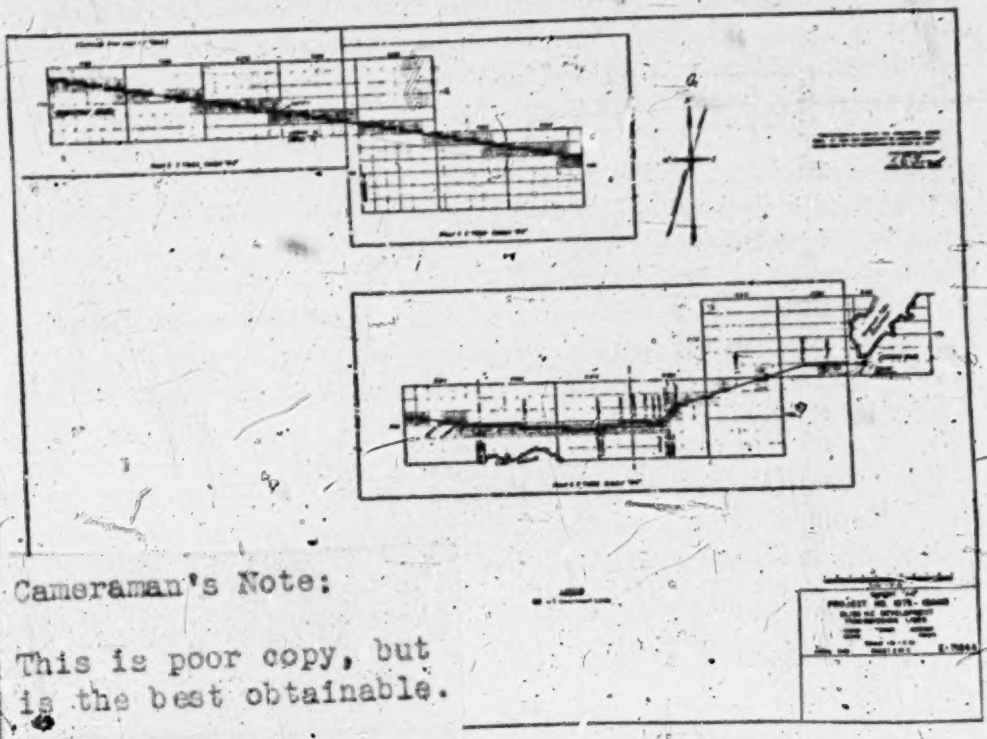
[fol. 53] EXHIBIT "J-1" TO APPLICATION



[fol. 54] EXHIBIT "J-2" TO APPLICATION



[fol. 55] EXHIBIT "J-2" TO APPLICATION



Cameraman's Note:

This is poor copy, but is the best obtainable.

[fol. 56] EXHIBIT M TO APPLICATION

Amended 4/15/49

GENERAL DESCRIPTION AND SPECIFICATIONS OF EQUIPMENT

The equipment proposed to be installed in this power plant includes three vertical water wheel driven electric generators, each having a capacity rating of about 23,000 kw, 25,000 kva, 3 phase, and designed for operating at 60 cycles, 13,800 volts. Turbines will have propeller-type runners. Individual 3-phase transformers, connecting to each generating unit of capacity equal to the generator, will step the voltage up from 13,800 to 138,000 volts for transmission. Each water wheel will be protected by trash racks. Headgates will provide a means of cutting off the water supply to each unit. One set of tailwater gates will serve all units for use in emptying draft tubes of water for mainfenance work. A gantry crane, suitable for handling all heavy parts of the installation, will be installed, with such smaller cranes as may be necessary for handling headgates, tailgates, and trash rack cleaner. Flood gates and spillway capacity will be provided suitable to safely handle 95,000 cubic feet per second of river flow. The maximum flow of record at the location of this site is approximately 47,200 cubic feet per second.

Transmission lines will consist of two 138-kv, 3-phase, single circuit, transmission lines, extending northwesterly from the power plant approximately 73 miles to Boise, and from the plant extending easterly approximately 116 miles to American Falls, Idaho. Lines will consist of 2-pole, H-frame towers, flat suspension type construction normally, with 3 and 4-pole towers at angle points and other special locations. Normal tower span will be 650 feet. Conductors will consist of three 715,500 CM ACSR. Two overhead ground wires will extend a distance of approximately one mile from each terminal substation, with arrangement for adding overhead ground wires throughout the entire length of the lines if experience dictates this to be desirable. All structures will be X-braced, and crossarms will be reinforced with K braces. Crossarm length will be 40 feet, providing 20-foot spacing between conductors. A ground wire will be installed on each pole.

This statement is a part of the application for license filed by the undersigned on August 22, 1947.

IDAHO POWER COMPANY
By (Sgd.) T. E. ROACH
President.

[fol. 57] EXHIBIT N TO APPLICATION
Amended 4/15/49

ESTIMATE OF PROJECT COST

The following is an estimate of the cost of the proposed development as prepared by Company engineers. This estimate is subject to change as detailed designs are completed and equipment prices obtained.

Land and Land Rights		$ 75,000
Structures and Improvements		2,500,000
Reservoirs, Dam, and Waterways		4,075,000
Turbines and Generators		3,250,000
Accessory Electrical Equipment		200,000
Miscellaneous Power Plant Equipment		25,000
Roads, Trails, and Bridges		200,000
Transmission Substation Equipment		600,000
Communication Equipment		25,000
Engineering and Miscellaneous Overheads—15%		1,650,000
		$12,600,000
138-kv Transmission Lines:		
Bliss-Boise	$1,600,000	
Bliss-American Falls	1,800,000	3,400,000
Total		$16,000,000

This statement is a part of the application for license filed by the undersigned on August 22, 1947

IDAHO POWER COMPANY,
By (Sgd) T. E. ROACH
President.

[fol. 58] BEFORE THE FEDERAL POWER COMMISSION

Project No. 1975—Idaho

Idaho Power Company
c/o Leighton and Gamble
1518 K Street, N.W.
Washington 5, D. C.

May 2 1949

Gentlemen:

Reference is made to your letter of April 26, 1949 requesting pre-license permission to commence construction of two 138-kilovolt transmission lines from the power plant of Project No. 1975 (Bliss) to Boise and to American Falls respectively, the two lines being covered in your application filed on April 20, 1949 seeking approval for their inclusion in the project.

You state that the need for energy at American Falls and vicinity is urgent and that you desire pre-license permission to commence construction immediately.

You are advised that pre-license construction of the two 138-kilovolt lines extending from your Bliss power-plant to Boise and to American Falls respectively, at your own risk, subject to the requirements of the agency or agencies having jurisdiction over the Government lands involved, will not prejudice consideration by the Commission of your application filed April 20, 1949 for inclusion of the lines in the project.

By direction of the Commission.

Very truly yours,
LEON M. FUQUAY
Secretary

LP
JTT:ea
4-28-49
cc: San Francisco Regional Office
Bureau of Law
Commissioner Draper
Division of Licensed Projects
Secretary of the Interior (2)

FACSIMILE

Project No. 1975-Idaho

MAY -2 1949

FEDERAL POWER COMMISSION
DOCKETED
MAY 2 1949
DOCKET SECTION
SECRETARY'S OFFICE

Idaho Power Company
c/o Leighton and Gamble
1518 K Street, N.W.
Washington 5, D. C.

Gentlemen:

Reference is made to your letter of April 26, 1949 requesting pre-license permission to commence construction of two 138-kilovolt transmission lines from the power plant of Project No. 1975 (Bliss) to Boise and to American Falls respectively, the two lines being covered in your application filed on April 20, 1949 seeking approval for their inclusion in the project.

You state that the need for energy at American Falls and vicinity is urgent and that your desire pre-license permission to commence construction immediately.

You are advised that pre-license construction of the two 138-kilovolt lines extending from your Bliss power plant to Boise and to American Falls respectively, at your own risk, subject to the requirements of the agency or agencies having jurisdiction over the Government lands involved, will not prejudice consideration by the Commission of your application filed April 20, 1949 for inclusion of the lines in the project.

By direction of the Commission.

Very truly yours,

Leon M. Fuquay

Secretary

LP
JTT:ea
4-28-49
cc: San Francisco Regional Office
Bureau of Law
Commissioner Draper
Division of Licensed Projects
Secretary of the Interior (2)

[fol. 59] BEFORE THE FEDERAL POWER COMMISSION

Project No. 1975—Idaho

The Honorable

The Secretary of the Interior

Washington 25, D. C.

Jul 29 1949

Dear Sir:

My letters dated February 19, 1948, and May 27, 1948, Assistant Secretary of the Interior William E. Warne reported on the application of Idaho Power Company for a license for the Bliss hydroelectric development (project No. 1975) on Snake River in Idaho. On March 2, 1948, the Commission adopted an order authorizing issuance of a license for the project.

The licensee has requested amendment of its application to include 138-kilovolt transmission circuits extending from the Bliss plant to substations near Boise, Idaho, and American Falls, Idaho, distances of approximately 73 miles and 116 miles, respectively. The lines would be located in Elmore, Ada, Twin Falls, Gooding, Jerome, Lincoln, Minidoka, Elaine, and Power Counties, Idaho, and would cross public lands of the United States.

The applicant was informed by letter dated May 2, 1949, copies of which were furnished your office, that pre-license construction of the two 138-kilovolt lines at its own risk, subject to the requirements of the agency or agencies having jurisdiction over the Government lands involved, would not prejudice consideration by the Commission of its application for inclusion of the lines in the project.

A copy of the applica on received April 20, 1949, is enclosed. That application was amended and supplemented by the filing on July 1, 1949, of revised Exhibits J-2 and K-2, a revised Exhibit F, and an additional exhibit designated as Exhibit P. The sheets which have been superseded have been so marked on the reduced sheets included in the attached copy of the application, and the Federal Power Commission numbers which have been assigned to those not superseded have been placed on the remaining sheets. A complete set of prints of the maps and drawings which now form a part of the application filed April 20 as later amended is being sent to you under separate cover. These are designated as follows:

[fol. 60] Letter to The Secretary of the Interior

Exhibit J-1	(F.P.C. No. 1975-13)
Exhibit J-2, Sheets 1 and 2	(F.P.C. Nos. 1975-24 and 25)
Exhibit K-1, Sheets 1, 2, and 3	(F.P.C. Nos. 1975-16, 17, and 18)
Exhibit K-2, Sheets 1, 2, 3, and 4	(F.P.C. Nos. 1975-26, 27, 28, and 29)
Exhibit L-2	(F.P.C. No. 1975-23)
Exhibit P	(F.P.C. No. 1975-30)

A print of revised Exhibit L, Sheet 1 (F.P.C. No. 1975-9), filed May 25, 1948, superseding Exhibit L, Sheet 1 (F.P.C. No. 1975-6), a print of which was transmitted to you with our letter of December 22, 1947, is also being sent to you under separate cover with the prints listed in the preceding paragraph.

In accordance with the provisions of section 4(e) of the Federal Power Act, you are invited to report whether modification of the Commission's order of March 2, 1948, to authorize inclusion in the license of the transmission lines as proposed in this application would interfere or be inconsistent with the purpose for which any reservation under your supervision was created or acquired, and to state the conditions, if any, in addition to those already recommended, which are deemed necessary for the adequate protection and utilization of any such reservation.

It will be appreciated if in this case you will submit your report within 30 days from the date of this letter so that the matter may be presented to the Commission promptly with a view to issuance of the license at an early date. If more than 30 days should be necessary, will you please so inform the Commission.

Very truly yours,

LEON M. FUQUAY

Secretary

3 Enclosures:

No. 66305—Copy of application filed 4/20/49

No. 66306—Copy of Exhibit F filed 7/1/49

No. 66307—13 prints (under separate cover)

LP
ARH:ea
7-15-49

cc: The Secretary of the Interior
San Francisco Regional Office
Division of Licensed Projects
Bureau of Law
Commissioner Draper

[fol. 61] BEFORE THE FEDERAL POWER COMMISSION

UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF THE SECRETARY

WASHINGTON 25, D. C.

Aug. 10 1949

My dear Mr. Smith:

This is in answer to the Commission's letter dated July 29 in which you inform us that on April 20, 1949, the Idaho Power Company has filed an application for an amendment to its license for *Project No. 1975* to include two 138 KV transmission lines extending from the Bliss plant to substations near Boise, Idaho, and American Falls, Idaho.

From the data transmitted, it appears that these lines would be built in part over public lands which are under the jurisdiction of the Department of the Interior. These public lands are listed in Appendix A, annexed hereto.

Your Commission will be interested in the following developments which took place before the Idaho Power Company filed its application on April 20, 1949:

1. On July 9, 1948, the Company applied to the Bureau of Land Management of the Department of the Interior for a permit to construct a transmission line over public lands in advance of a formal application for a right-of-way pursuant to the Department's rules and regulations.

2. The proposed transmission line was to be ultimately a 230 KV line and was to extend between Boise and American Falls, Idaho.

The right-of-way desired by the Company over the public lands would constitute more than half of the entire right-of-way for the said line. The total cost of the line, including 230 KV terminal facilities, was estimated at approximately $4,000,000. However, the Company proposed to operate this line initially at 138 KV and thus defer installation of the 230 KV terminal facilities.

3. The Department has, for some time, been vitally interested in and concerned with the supply of power in the southern part of the State of Idaho. The Federal Government has hydroelectric projects in the area, and other Federal projects are either under construction or have been authorized to be constructed. Prior to the time when the Idaho Power Company applied for a pre-construction permit to erect the transmission line over the public lands, the Bureau of Reclamation and the Bonneville Power Administration made and submitted a joint report entitled "Report on Availability of Power in Southern Idaho for Development of Phosphate Industry." In [fol. 62] this report the two agencies of the Department proposed that the United States construct, own, and operate a transmission line which would connect the eastern and western parts of the southern Idaho region. This report was transmitted to the Idaho Power Company with a request for a conference to explore the possibility of cooperative arrangements in order to supply power for potential phosphate producers as soon as possible.

4. Before any discussions took place, the Company requested a permit to construct the 230 KV line, referred to above, so that it, rather than the Federal Government, would own and operate this important tie-line. Extensive negotiations followed in which the representatives of the Department took the position that if the public lands of the United States were to be used by the Company for the construction of such an important part of the future power system of the region, the public interest required that the ownership and operation of this line by the Company should not interfere with the later development of federally owned power generating and marketing facilities; also, that there should not be any wasteful duplication of transmission facilities. Since the Company had not shown a present need for a 230 KV line, the Department proposed to grant a preconstruction permit and later a permit or easement for the necessary right-of-way subject, however, to the right of the Government to transmit its power over this line to the extent of its unused capacity, upon the payment of an equitable share of the operation and maintenance cost proportionate to the capacity used.

5. The transmission line for which the Company sought a permit from the Bureau of Land Management, whether regarded as one line from Boise to American Falls, or as two lines from Boise to

Hagerman and from Hagerman to American Falls, was intended as a trunk line, not as a project line.

(*a*) In submitting its data to the Division of Power of the Department of the Interior, in a letter dated August 6, 1948, the Company stated as follows:

> "This line will serve as a main transmission line, interconnecting the Boise-Caldwell area with the Pocatello area. It is expected to adequately serve this purpose in parallel with the existing 138 KV line for a period of 5 to 10 years, after which it is probable that a duplicate 230 KV line will be required. Its need in 1949 is due to the rapid growth of system load and to the phosphate furnace load contracted for in 1949 and 1950. Indications point to further growth of the phosphate load and to a continued growth of general business load."

[fol. 63] (*b*) In a letter dated August 13, 1948, the Company stated as follows with reference to the same line:

> "With the rapid load growth since the war and considering normal increase, anticipated in the next few years, plus the possible addition of a considerable amount of chemical load, we feel that it would be very shortsighted to construct a major trunk transmission line, not suitable for 230 KV operation."

(*c*) The Company also submitted a "Single Line Diagram", which is attached hereto as Appendix B. Examination of this diagram shows that the Company intended to place the power from its Bliss plant on its existing 138 KV bus at the Hagerman switchyard by means of a relatively short 138 KV transmission line. It is this short line connecting the Bliss plant with the Hagerman switchyard which can properly be regarded as part of the licensed project. Thus, it was proposed that the power generated at the Bliss plant would be put on the Company's system at Hagerman rather than at Boise and at American Falls.

(*d*) In order to firm up the transmission capacity of the system the Company also decided that a new 230 KV transmission line (to be initially operated at 138 KV) should be built from Boise to American Falls tying in with the Hagerman switchyard. The "Single-Line Diagram" shows that 42,000 KW of power would flow from the Hagerman switchyard to Boise over the existing 138 KV line and 45,000 KW over the new line. The "Single-Line Diagram" further shows that 30,000 KW of power would flow to American Falls over the existing 138 KV line and 25,000 KW over the new line. The division of power flow between these two lines would, of course, be determined by the loads which the Company

would impose on these lines and would not necessarily bear any definite relation to generation at licensed Project No. 1975.

(e) If it were intended to use the new line to transmit only the 69,000 KW available at the Bliss plant to the load centers, the proposed line would have no engineering feasibility and would be economically unsound, since it would have about twice the capacity of the Bliss plant when operated at 138 KV and over 4 times the capacity of the Bliss plant when operated at 230 KV.

6. Through all the negotiations, the Company resisted the conditions sought to be imposed, namely, that the unused capacity of the line be utilized by the Government for the transmission of its power upon payment of just compensation. On April 11, 1949, the Company withdrew its application for a permit or right-of-way for the reason (later stated by its representative in a letter to the Bureau of Land Management, dated May 27, 1949) that on March 2, 1948, the Federal Power Commission had issued a license for Project No. 1975 with a reservation, among others, that

[fol. 64] "The Commission reserves the right to determine at a later date what transmission facilities should be included in the license as a part of the project."

The withdrawal of the application from the Bureau of Land Management was followed up by the filing of the application to amend the license so as to include the two lines in question.

Upon examination of the maps and drawings which form part of the application, it appears that the transmission lines sought to be included in the project are not, properly speaking, project lines as defined in section 3(11) of the Federal Power Act, namely, "primary line or lines transmitting power therefrom (that is, from the project) to the point of junction * * * with an interconnected primary transmission system." The lines for which application was made are clearly intended to be an important part of the Company's transmission system itself, and constitute substantially the line for which the Company negotiated with this Department.

It is obvious that the application is wholly without merit, and that the Company's sole purpose was to invoke the regulatory jurisdiction of the Commission to oust temporarily the jurisdiction of the Secretary of the Interior until the line will have been constructed. Thus it figured to avoid the requirements of law that such transmission lines could be constructed on these public lands only after obtaining a permit or easement from the Secretary of the Interior.

Of course, the mere filing of an application would not accomplish

this result. Therefore, on April 26, 1949, the Company, by a letter to the Federal Power Commission, requested that it be granted pre-license permission to commence the construction of these lines. As your letter indicates, your Commission informed the Company on May 2, 1949, that "Pre-license construction of the two 138-Kilovolt lines at its own risk, subject to the requirements of the agency or agencies having jurisdiction over the Government lands involved, would not prejudice consideration by the Commission of its application for inclusion of the lines in the project."

We had no notice or opportunity to be heard on the request made by the Idaho Power Company for pre-license permission to construct the lines over the public lands. We recognize that we were not prejudiced by the Commission's action upon the Company's request, since permission, if indeed it was a permission, was granted subject to such requirements as might be imposed by the Department. Nevertheless, had we had notice, we might have been in a position to put at your disposal the facts above stated.

Upon close scrutiny, it appears that the Commission's action was [fol. 65] not even tantamount to a pre-license permission, because if the proposed lines do not constitute project lines within the meaning of section 3(11) of the Federal Power Act, and the application is denied, it is not the pre-license construction that would prejudice consideration of the application, but the requirements of the law itself.

The Company treated the Commission's letter dated May 2, 1949, as a pre-license permit and, without regard to the requirements of the Department and without authority of law, entered and trespassed upon the public lands and commenced to construct and is continuing to construct the transmission lines thereon. Obviously, the Company's concern is not to construct a project line, but to construct a trunk transmission line flouting the requirements of this Department. In this manner, the Company is using the Commission's letter as a vehicle for the construction of the lines in violation of the very conditions stated in that letter.

Upon our request, the Attorney General brought action against the Idaho Power Company to enjoin the trespass, and on August 8 the United States District Court for the District of Idaho granted a temporary restraining order.

In these circumstances, we request that the Idaho Power Company should be required, upon short notice, to appear and show cause

why its application dated April 20, 1949, should not be dismissed forthwith.

Sincerely yours,

J. A. KRUG
Secretary of the Interior.

Hon. Nelson Lee Smith
Chairman, Federal Power Commission
Washington 25, D. C.

Appendices mailed under separate cover.

[fol. 66] BEFORE THE FEDERAL POWER COMMISSION

Project No. 1975

Idaho Power Company
c/o Leighton and Gamble
1518 K Street, N. W.
Washington 5, D. C.

Aug 16 1949

Gentlemen:

It will be recalled that on April 20, 1949 an application was filed by the Idaho Power Company for amendment of the license with the Bliss plant on the Snake River, Project No. 1975, to authorize construction and operation as part of the project works, two 138-kilovolt transmission circuits from this plant to substations near Boise, Idaho, and American Falls, Idaho.

Under date of May 2, 1949, you were advised that pre-license construction of these lines, "at your own risk, subject to the requirements of the agency or agencies having jurisdiction over the Government lands involved, will not prejudice consideration by the Commission of your application filed April 20, 1949 for inclusion of the lines in the project.".

There is enclosed a copy of a letter from the Secretary of the Interior under date of August 10, 1949, with respect to these lines, together with a copy of our response of even date thereto. Your prompt attention to this matter and a full explanation of the situation is requested.

Very truly yours,

JOSEPH H. GUTRIDE
Acting Secretary

Enclosure No. 16458

FACSIMILE

[redacted]

Proj. No. 1975

AUG 16 1949

Idaho Power Company
c/o Leighton and Gamble
1518 K Street, N. W.
Washington 5, D. C.

Gentlemen:

It will be recalled that on April 20, 1949 an application was filed by the Idaho Power Company for amendment of the license with the Bliss plant on the Snake River, Project No. 1975, to authorize construction and operation as part of the project works, two 138-kilvolt transmission circuits from this plant to substations near Boise, Idaho, and American Falls, Idaho.

Under date of May 2, 1949, you were advised that pre-license construction of these lines, "at your own risk, subject to the requirements of the agency or agencies having jurisdiction over the Government lands involved, will not prejudice consideration by the Commission of your application filed April 20, 1949 for inclusion of the lines in the project."

There is enclosed a copy of a letter from the Secretary of the Interior under date of August 10, 1949, with respect to these lines, together with a copy of our response of even date thereto. Your prompt attention to this matter and a full explanation of the situation is requested.

Very truly yours,

Joseph H. Gutride
Acting Secretary

Enclosure No. 16458

SIGNED ORIGINAL MAILED
F.P.C. MAIL ROOM—4

[fol. 67] BEFORE THE FEDERAL POWER COMMISSION

Project No. 1975—Idaho

The Director,
Bureau of Land Management,
Department of the Interior
Washington 25, D. C.

Aug 24 1949

Dear Sir:

In accordance with the provisions of Section 24 of the Act of June 10, 1920 (41 Stat. 1063), as amended, notice is hereby given that the hereinafter described lands of the United States are included in power project No. 1975 for which amendatory application has been filed by the Idaho Power Company, Boise, Idaho. The lands are embraced in proposed transmission line rights-of-way and sites required for the location of guys and anchorages. The date of filing of the amendatory application and map for the transmission line right-of-way is April 20, 1949, which has been supplemented by revised map filed July 1, 1949 indicating the lands necessary for guy and anchorage purposes. Under said Section 24 these lands are, from the respective dates of filing of maps, reserved from entry, location or other disposal under the laws of the United States until otherwise directed by the Commission or by Congress.

Boise meridian, Idaho.

All portions of the following described subdivisions lying within 40 feet of the center line survey of the transmission line right-of-way location, plus additional lands lying beyond the marginal limits thereof required for guy anchorages, as shown on revised map designated as "Exhibit K-2" and entitled "Project No. 1975-Idaho, Bliss H.E. Development, Transmission Detail Map, Idaho Power Company, Boise, Idaho," and filed in the office of the Federal Power Commission on July 1, 1949:

T. 2 N., R. 3 E., sec. 5, lot 4.

T. 1 N., R. 4 E., sec. 15, SW¼SW¼;
sec. 22, SE¼SE¼.

T. 1 S., R. 5 E., sec. 15, NW¼NW¼, SE¼NW¼, NW¼ SE¼, S½SE¼;
sec. 25, SW¼NE¼, N½SE¼, SE¼SE¼;
sec. 26, NE¼NE¼.

T. 1 S., R. 6 E., sec. 30, lot 4;
sec. 31, lot 1, SW¼NE¼, NE¼NW¼, NW¼ SE¼.

T. 2 S., R. 6 E., sec. 4, W½SW¼, SE¼SW¼;
sec. 5, lot 4, SW¼NE¼;
sec. 9, NW¼NE¼, S½NE¼, NE¼NW¼, NE¼SE¼;
sec. 10, NW¼SW¼, S½SW¼;
sec. 14, SW¼NW¼, SW¼SE¼, NE¼SW¼;
sec. 15, NW¼NE¼, S½NE¼, NE¼NW¼, NE¼SE¼;

[fol. 68]

sec. 23, N½NE¼, SE¼NE¼;
sec. 24, SW¼NW¼, SW¼SE¼, E½SW¼, NW¼SW¼;
sec. 25, N½NE¼, SE¼NE¼;

T. 2 S., R. 7 E., sec. 30, lots 2, 3, SE¼NW¼, NW¼SE¼, S½SE¼, E½SW¼;
sec. 31, NE¼NE¼;
sec. 32 NW¼NW¼, S½NW¼, NW¼SE¼, S½SE¼, NE¼SW¼.

T. 3 S., R. 7 E., sec. 3, SW¼SW¼;
sec. 4, lots 3, 4, S½NW¼, SW¼NE¼, N½SE¼, SE¼SE¼;
sec. 5, lot 1;
sec. 10, NW¼NW¼, E½SE¼;
sec. 11, SW¼SW¼;
sec. 13, W½SW¼, SE¼SW¼;
sec. 14, NW¼NE¼, S½NE¼, N½NW¼, SE¼NW¼, NE¼SE¼;
sec. 24, W½NE¼, SE¼NE¼ NE¼NW¼, NE¼SE¼.

T 3 S., R. 8 E., sec. 19, lots 3, 4, SW¼SE¼, E½SW¼;
sec. 29, SW¼NW¼, SW¼SE¼, N½SW¼, SE¼SW¼;
sec. 30, N½NE¼, SE¼NE¼, NE¼NW¼;
sec. 32, E½NE¼, NW¼NE¼;
sec. 33, S½NW¼, SE¼, NE¼SW¼;
sec. 34, SW¼SW¼.

T. 4 S., R. 8 E., sec. 1, SW¼SW¼;
sec. 2, SW¼NW¼, W½SE¼, SE¼SE¼, N½SW¼;
sec. 3, lots 2, 3, 4, S½NE¼.

T. 4 S., R. 9 E., sec. 7, SE¼SE¼;
sec. 17, SW¼NE¼, NW¼, N½SE¼;
sec. 18, NE¼NE¼;
sec. 21, NE¼NE¼;

sec. 22, SW¼NE¼, NW¼NW¼, S½ NW¼, E½SE¼, SW¼SE¼, NE¼SW¼;
sec. 23, S½SW¼;
sec. 25, W½SW¼, SE¼SW¼;
sec. 26, W½NE¼, SE¼NE¼, N½NW¼, NE¼SE¼.

T. 4 S., R. 10 E., sec. 31, lots 3, 4, SE¼SW¼.

T. 5 S., R. 10 E., sec. 5, W½SW¼, SE¼SW¼;
sec. 6, lots 2, 3, S½NE¼, NE¼SE¼.
sec. 8, N½NE¼, SE¼NE¼, NE¼NW¼.
sec. 9, SW¼NW¼, S½SE¼, N½SW¼, SE¼ SW¼;
sec. 14, lot 4;
sec. 15, NW¼NW¼, S½NE¼;
sec. 25, SE¼NE¼.

T. 5 S., R. 11 E., sec. 30, lots 2, 3, SW¼SE¼, E½SW¼;
sec. 31, NW¼NE¼.

T. 6 S., R. 11 E., sec. 10, SW¼SW¼;
sec. 14, lots 1, 3, NW¼NE¼;
sec. 15, lot 3.

[fol. 69]

T. 6 S., R. 12 E., sec. 8, lot 8;
sec. 13, W½SW¼, SE¼SW¼;
sec. 14, S½N½, NE¼SE¼;
sec. 15, NW¼, S½NE¼;
sec. 17, N½NE¼, NE¼NW¼.
sec. 24, NW¼NE¼, S½NE¼, NE¼NW¼, NE¼SE¼.

T. 6 S., R. 13 E., sec. 19, lots 3, 4, SE¼SW¼;
sec. 29, W½SW¼, SE¼SW¼;
sec. 30, NW¼NE¼, S½NE¼, NE¼NW¼, NE¼SE¼;
sec. 32, W½NE¼, SE¼NE¼, NE¼NW¼, NE¼SE¼;
sec. 33, W½SW¼, SE¼SW¼.

T. 7 S., R. 13 E., sec. 3, lots 3, 4, NW¼SE¼, S½SE¼, NE¼ SW¼;
sec. 10, lot 1;

T. 7 S., R. 14 E., sec. 9, NE¼NW¼;
sec. 10, N½N½.
sec. 11, N½N½;
sec. 12, N½N½.

T. 7 S., R. 15 E., sec. 7, lot 1, N½NE¼, NE¼NW¼;
sec. 8, N½N½;
sec. 9, N½N½;
sec. 10, N½N½;
sec. 11, N½N½;
sec. 12, N½N½.

T. 7 S., R. 16 E., sec. 7, lot 1, N½NE¼, NE¼NW¼;
sec. 8, N½N½;
sec. 9, N½N½;
sec. 10, N½N½;
sec. 11, N½N½;
sec. 12, N½N½.

T. 7 S., R. 17 E., sec. 7, lot 1, N½NE¼;
sec. 8, N½N½;
sec. 9, N½N½;
sec. 10, N½N½;
sec. 11, N½N½;
sec. 12, N½N½.

T. 7 S., R. 18 E., sec. 7, lot 1, N½NE¼, NE¼NW¼;
sec. 8, S½NE¼, E½NW¼, NW¼NW¼;
sec. 9, S½N½, NE¼SE¼;
sec. 10, N½S½.
sec. 11, NW¼SW¼, S½S½;
sec. 12, S½S½.

T. 7 S., R. 19 E., sec. 13, SW¼SE¼, S½SW¼;
sec. 14, NW¼SW¼, S½S½;
sec. 15, N½S½;
sec. 17, S½NE¼, NW¼;
sec. 18, lots 1, 2, N½NE¼, NE¼NW¼;
sec. 24, N½NE¼, NE¼NW¼.

[fol. 70]

T. 7 S., R. 20 E., sec. 19, lot 1, N½NE¼, NE¼NW¼;
sec. 20, NW¼NW¼, S½N½;
sec. 21, SW¼NE¼, S½NW¼, N½SE¼,
NE¼SW¼;
sec. 22, N½S½, SE¼SE¼;
sec. 23, S½S½;
sec. 24, S½SW¼;
sec. 25, N½NE¼, NE¼NW¼.

T. 7 S., R. 21 E., sec. 25, SW¼SW¼;
sec. 26, S½S½;
sec. 27, NW¼SE¼; S½SE¼, N½SW¼;

sec. 28, SW¼NW¼, N½S½;
sec. 29, S½N½;
sec. 30, N½N½, SE¼NE¼.

T. 7 S., R. 22 E., sec. 31, lot 1, S½NE¼, E½NW¼;
sec. 32, S½N½; NE¼SE¼;
sec. 33, N½S½;
sec. 34, S½SE¼; N½SW¼, SE¼SW¼;
sec. 35, S½S½.

T. 8 S., R. 22 E., sec. 1, lots 1, 2.

T. 8 S., R. 23 E., sec. 2, S½S½;
sec 3, W½SE¼, SE¼SE¼N½SW¼;
sec. 4, SW¼NW¼, N½S½;
sec. 5, S½N½;
sec. 6, lots 1, 2, 3, SE¼NE¼.
sec. 11, NE¼NE¼;
sec. 12, N½N½.

T. 8 S., R. 24 E., sec. 7, lot 1, S½NE¼, E½NW¼;
sec. 8, S½N½, NE¼SE¼;
sec. 9, N½S½;
sec. 10, NW¼SW¼, S½S½;
sec. 11, S½SW¼;
sec. 13, N½N½, SE¼NE¼;
sec. 14, N½NE¼, NE¼NW¼.

T. 8 S., R. 25 E, sec. 14, S½SW¼;
sec. 15, S½S½;
sec. 17, S½NW¼, N½S½;
sec. 18, lot 2, S½NE¼, SE¼NW¼;
sec. 23, N½NE¼, NE¼NW¼;
sec. 24, N½N½.

T. 8 S., R. 26 E., sec. 19, lot 1, N½NE¼;
sec. 20, N½N½;
sec. 21, N½N½;
sec. 22, S½NE¼, NW¼;
sec. 23, S½N½;
sec. 24, S½N½.

[fol. 71]

T. 8 S., R. 27 E., sec. 19, lot 2, S½NE¼, SE¼NW¼, N½SE¼;
sec. 20, N½S½;
sec. 21, N½S½;
sec. 22, NW¼SW¼, S½S½;
sec. 23, S½S½;
sec. 24, SW¼SE¼, S½SW¼;
sec. 25, N½NE¼, NE¼NW¼.

T. 8 S., R. 28 E., sec. 10, S½SE¼;
sec. 11, S½SW¼;
sec. 12, SE¼NE¼;
sec. 15, NW¼NE¼, E½NW¼, SW¼NW¼, NW¼SW¼;
sec. 19, S½SE¼, SE¼SW¼;
sec. 20, N½SE¼, E½SW¼, SW¼SW¼;
sec. 21, NW¼NE¼, E½NW¼, SW¼NW¼, N½SW¼;
sec. 30, lot 1, NE¼SW¼.

T. 7 S., R. 29 E., sec. 35, SE¼SE¼.

T. 8 S., R. 29 E., sec. 2, lots 1, 2, 3;
sec. 5, SW¼SE¼, SE¼SW¼;
sec. 7, lot 2, NW¼NE¼, SE¼NW¼;

T. 7 S., R. 30 E., sec. 34, N½NW¼;
sec. 35, N½NW¼.

The general determination made by the Commission at its meeting of April 17, 1922, with respect to lands reserved for power transmission line purposes only, is applicable to these lands. The area reserved by the filing of this application is approximately 1,240.93 acres.

A photostatic copy of each of seven sheets of the project map (FPC 1975—24-30, inclusive) is transmitted herewith.

Very truly yours,

J. H. GUTRIDE
Acting Secretary

Inclosure

1 cc and map (Inclosure 130311) to Bureau of Land Management

1 cc and map (Inclosure 130312) to Land of Survey Office, Federal Building, Boise, Idaho

1 cc and map (Inclosure 130313) to San Francisco Regional Office

3 cc and map (Inclosure 130314) to U.S. Geological Survey

Bureau of Law

Commissioner Draper

Division of Licensed Projects

LP

MPD/dec

8-10-49

[fol. 72] BEFORE THE FEDERAL POWER COMMISSION

IDAHO POWER COMPANY
BOISE, IDAHO

September 9, 1949

Federal Power Commission
Hurley-Wright Building
Washington 25, D. C.

Gentlemen:

This will acknowledge and thank you for the Commission's letter of August 16, 1949, transmitting copy of letter from the Secretary of the Interior to the Commission, and requesting a full explanation of the situation with respect to the construction of the transmission lines from the Bliss project (No. 1975) to Boise and American Falls, respectively, which are the subject of our application of April 20, 1949, filed with and now pending before the Commission. We are pleased to comply with such request, and appreciate the opportunity to respond in detail to the Secretary's communication.

With respect to paragraph 3 of the Secretary's letter, this Company has the full responsibility under state law and franchise obligations for supplying the power needs of its service area in southern Idaho, northern Nevada and eastern Oregon. For more than thirty years we have been serving this territory, and are charged by law with the duty of providing adequate and sufficient facilities to supply the electrical needs of the area which we serve. During all this period, Idaho Power Company has fulfilled this responsibility and met every demand for electrical service, including the rapidly increasing demands which have been imposed upon our system since the war. We are fully able and intend to continue to fulfill this responsibility. We believe it only appropriate to point out that during the winter of 1948-1949, the territory served by Idaho Power Company was practically the only area in the Pacific Northwest in which no power shortage existed at any time; and, further, that during this period the Company, through the Northwest Power Pool, exported a substantial supply of electricity to alleviate the critical conditions which existed in other Pacific Northwest areas.

For the Commission's information, it seems desirable at the outset to refer in sequence to certain significant errors in the Secretary's letter, because they convey impressions which would, if not corrected, intensify the build-up of alleged wrongful purpose which is imputed to this Company in the Secretary's communication.

With regard to the "Report on Availability of Power in Southern Idaho for Development of Phosphate Industry," referred to in paragraph 3 of the Secretary's letter, this report is dated April 12, 1948, and was transmitted to us by the Department of the Interior, Bureau of Reclamation, under date of May 26, 1948, following which a conference was promptly held with representatives of the Bureau on May 31, 1948. They were advised that we would be glad to meet again at any time, but no further conference was ever arranged.

As to the availability of power in southern Idaho for development of the phosphate industry, the Company, in December 1947, contracted to serve the electric furnace load of Food Machinery Corpo- [fol. 73] ration (Westvaco Division) in Pocatello. The contract calls for supplying of service for two electric furnaces, each of approximately 17,000-kw capacity, one of which is already in operation, the second unit being scheduled for operation early in 1950, with two additional furnaces contemplated for the future, making four units in all. It was partly in contemplation of this load that the Company, in the early summer of 1947, decided to provide additional transmission facilities, which, subsequently, became the subject of the Secretary's communication. In addition to the above furnace load, the Company is serving various other phosphate installations in the area, is in close touch with plans and programs of other potential producers, and is making preparation to supply all such future needs, as well as the important atomic reactor load, which only recently has become a material factor in the Company's eastern Idaho power supply program.

The implication in paragraph 4 of the letter, that the Company's decision to construct these additional transmission facilities was made as a result of the Department's announced transmission program, is completely negatived by the facts. As stated above, decision to construct the line was made early in the summer of 1947. Insulators were ordered on October 13, and conductor on October 14, 1947; crossarms were ordered on March 30, and poles on April 16, 1948, the latter two items not involving the delay then attendant in obtaining the insulators and conductor. The Company's printed annual report to its stockholders for 1947—dated February 2, 1948, but actually sent to the printer early in January,—shows the line on the map as it was then contemplated, and also contains a descriptive paragraph with reference thereto. On April 6, 1948, Mr. R. E. Gale appeared on behalf of the Company at the hearings held by the subcommittee of the Committee on Appropriations, House of Representatives, on the Interior Department Appropriation Bill for 1949, and presented a statement by the Company con-

taining a system map showing the line as then proposed; and reference to the line is also made in his testimony on page 1874, Part 3, of the printed record of the committee hearings.

When the Company decided to provide the transmission facilities then under consideration, it was entirely on the basis of our own requirements, and without any knowledge of the Department's projected intent. Survey for the line was begun several months before the report was issued on April 12, 1948. In June, a preliminary survey was completed, and on July 9, 1948, application for advance construction permit was filed, because of the urgent need for the new facilities in order to be able to carry our 1949-50 winter peak. Formal application for easement was filed in December 1948, as soon as the final survey was completed and maps and other necessary filing data could be prepared in accordance with the Department's regulations and requirements.

Because of material changes in its transmission plans, as a result of the decision to connect the Bliss plant directly into our main Boise substation to the west, and into the American Falls substation to the east, the Company concluded that the lines now under consideration are project lines within the meaning of the Federal Power Act. Accordingly, no action having been taken thereon, the Company subsequently withdrew its application to the Bureau of Land Management for easement under the Act of March 4, 1911, and on April 20, 1949, made application to the Federal Power Commission for inclusion of the Bliss-Boise and Bliss-American Falls 138-kv transmission lines as a part of the project facilities under Project 1975.

[fol. 74] It will be recalled that our original application for the Bliss license contained no details as to the transmission outlets from the plant, for the reason, as explained when the application was filed, that the Company had not completed its transmission studies in relation to the new project. The Commission, therefore, in its order of March 2, 1948, authorizing the Bliss license, reserved "the right to determine at a later date what transmission facilities should be included in the license as a part of the project."

At conferences with the staff concerning various details and questions which arose during the processing of our Bliss license application, the transmission situation was referred to. It is the writer's recollection that the matter of our pending application with the Department of the Interior was mentioned by the representatives of the Company. In this connection, the Commission's reservation of transmission line jurisdiction was called to our attention, and request was made that the Commission be supplied with detailed information, lacking in the original application, in reasonable time

so that the project transmission line matter could be determined by the Commission and the license for Project 1975 drafted in due course.

Contrary to the Secretary's statement in paragraph 5(a) of his letter, the capacity of the 138-kv line east to American Falls will be approximately 55,000 kw, and the line west to Boise will be approximately 75,000 kw. These capacities will barely care for the feeding of the Bliss plant output west during peak load conditions, and east during the valley of the west end load. The peaking capacity of the three units now being installed at Bliss will be at least 75,000 kw, and this will be further increased when the fourth unit is added, provision for which is included in the design. The only way in which the Secretary could have reached the conclusions expressed in paragraph 5(e) of his letter is on the assumption of equal simultaneous power flow each way from Bliss, which, of course, ignores the practical operating and loading conditions under which the facilities will operate. In fact, the 138-kv lines in question will have no more than adequate capacity to handle the east and west Bliss transmission requirements under the varying load conditions which must be met. The power flow figures on the single-line diagram mentioned in the Secretary's letter did not purport to show anything other than our estimates (of more than a year ago) for 1950, the first year in which the line will be in service. The Commission will recognize that the power business is not static; already those estimates have materially increased.

The Company believes that its conclusion that these lines are project lines under the provisions of sections 3(11) and 4(e) of the Federal Power Act is correct, and that our application for their inclusion in the license was properly and necessarily filed under the law and the Commission's specific reservation of jurisdiction in its order of March 2, 1948.

Coming now to the matter of the Company's application to the Commission for "pre-license permit" to commence construction of the Bliss outgoing lines, and the Commission's letter of May 2, 1949 in response thereto, we are enclosing herewith for your information copy of the Complaint, and of our Answer thereto, as filed in the action brought against us upon the request of the Department of the Interior, as stated in the Secretary's letter. In addition to the matters presented in the Company's Third Defense, in which the urgent need for the completion of these lines is shown, we respectfully call attention to the matters set forth in the Company's Second Defense, and particularly paragraphs 2, 3-d, and 6 thereof.

[fol. 75] It is our understanding that, under Sections 4(e) and 24 of the Federal Power Act, upon the filing of an application for

license, any and all public lands involved are reserved from entry, location, *or other disposal* until otherwise directed by the Commission, and that the Commission is the agency having jurisdiction with respect thereto.

It is understood, of course, that neither the Commission's letter of May 2, 1949, nor the many others that have preceded it in other cases involving this and other companies are permits according to the legal significance of that term, but they have commonly been called "pre-license permits" in the industry and in the Commission's staff ever since the Commission began to issue such authorizations, as a matter of practical necessity where facilities were urgently needed, some time prior to 1930. It is true that such "pre-license permits" issued since the practice was initiated by the Commission have specified that work performed thereunder would be at the owner's risk, and subject to the requirements of agencies *having jurisdiction* in each case. However, we have never interpreted such "pre-license permits" as requiring the obtainment of additional agency permission, as the Secretary's letter contends, where lands such as parks, Indian or military reservations, etc., were not involved, under immediate jurisdiction of some agency other than the Federal Power Commission. The fact is that during all the years past Idaho Power Company and many other companies in the West have not procured other agency permission so to occupy such lands of the United States, but have obtained agency consent where reservations, p rks, etc., were involved. It is our understanding that such practice was given approval by the Commissioner of the General Land Office at the outset of the "pre-license permit" issuance, and no one, so far as this Company can ascertain had, until the occurrence of the Bliss outgoing lines incident, been informed of any modification of the earlier advice given by the Commissioner of the General Land Office. Mr. M. O. Leighton, Consulting Engineer, of Washington, D. C., who has been the accredited Washington representative of Idaho Power Company since it commenced operations in 1916, is far more familiar with this situation than is the writer, and we believe that he could furnish an affidavit as to such practice and procedure over the years, should this be desired.

We therefore desire respectfully to submit our comments concerning what appears to be a fundamental aspect of the case with respect to the immediate jurisdiction over lands of the United States included within an application for license under the Federal Power Act. The first sentence of Section 24 of the Act reads as follows:

> "Any lands of the United States included in any proposed project under the provisions of this Part shall *from the date of filing of application* therefor be reserved from entry, location,

or other disposal under the laws of the United States until otherwise directed by the Commission or by Congress."

It appears from the foregoing that the Federal Power Commission is the only agency of the United States having immediate jurisdiction over lands reserved from entry, location or other disposal included within any proposed project. During withdrawal of such public lands, as provided in said Section 24, neither the Director of the Bureau of Land Management nor the Secretary of the Interior is possessed of authority to make any disposition thereof, because such lands are reserved from entry, location, or *other disposal.* Reverting to the case of the Bliss outgoing lines, the public [fol.76] lands to be crossed by which were automatically placed in withdrawal on April 20, 1949, it does not appear that the Department of the Interior or the Bureau of Land Management has any authority to make disposition of them whether by patent, grant, easement or permit. It follows that, having no authority to make such disposition, they can have no authority to impose and enforce stipulations, conditions or requirements precedent to such disposition, or restricting and conditioning the disposition of such lands by others, and especially the Federal Power Commission. Their jurisdiction, if any, is subordinate to that of the Federal Power Commission until the time when the land withdrawal is cancelled or modified by direction of the Commission or by Congress.

Our contention in this respect is not based merely upon our own interpretation of the law. In a decision by Acting Secretary of the Interior Finney, appearing in volume 52 of the "Decisions of the Department of the Interior Relating to Public Lands" (52 I. D. 377), denying a rehearing of a departmental decision rejecting an application for reservoir and canal rights of way, the Acting Secretary said:

"The language of the law is clear and decisive. Under the first sentence of Section 24 the mere filing of an application for water-power privileges operates automatically to withdraw water-power sites from entry, location, or disposal under other laws 'until otherwise directed by the Commission or the Congress.' Section 29 of the Act repeals all acts or parts of acts inconsistent therewith. *It is clear beyond question that the jurisdiction of this department over any lands of the United States included in any proposed project under the provisions of said Act automatically terminated upon the filing of an application therefor with the Federal Power Commission, and this department has no further control of the lands until and unless jurisdiction is restored by the commission or by congress.*

"I see no such doubt or ambiguity in the language employed in the Act as to justify resort to other aids for construction. The statute is plain and decisive and affords its own interpretation."

Various other authorities can be cited in support of the Department's own decision on this proposition, including 32 Opinions of Attorney General 528; Minner v. Sadler (Cal), 139 P (2d) 356; United States v. Southern Power Co., 31 F (2d) 852.

Because of the Secretary's reference to our former application to the Bureau of Land Management, it seems appropriate to refer to certain of the proceedings had in connection therewith, even though it has long since been withdrawn and cannot be a factor in a subsequent and separate proceeding under the Federal Power Act, except as the Secretary has used it as a basis for imputing to Company wrongful motives and ulterior purposes. This application was filed on July 9, 1948. Although many previous similar applications with respect to necessary transmission facilities had been promptly granted, no action was taken on our application, and repeated inquiries resulted in no information as to its status, or of any reason for delay, until October 14, 1948.

On the latter date an advance construction permit was tendered the Company, accompanied by a written stipulation under which the Company would have been forced to agree, among other things, to concede use of the line to "any agency or instrumentality of the Federal Government" for transmission of electric power "in such amounts as will not unreasonably interfere with the Company's use of said line."

[fol. 77] No such requirement had previously been imposed or even mentioned over many years of obtainment of rights-of-way over government lands, and no reference to any such requirement was contained in the Department's regulations and required stipulations, pursuant to which the Company's application had been filed. Because of this unusual feature in the required stipulation with respect to so important a line, as well as other undesirable conditions applicable to our construction and use of the line, the Company objected thereto. Thereafter, conferences were had with representatives of the Department, and a revised stipulation was transmitted to the Company. In some respects this revision met certain of the Company's objections, but as to other features deemed essential by the Company, the newly tendered stipulation was regarded as hazardous as the original one.

It should be pointed out that the Company was at this time attempting to obtain only an advance construction permit, the justi-

fication and need for which was acknowledged by the Department. The stipulation sought to be imposed as the price therefor was in the nature of a written contract to agree to requirements which would apply to the formal easement later to be obtained, but which were not a part of the Department's standard regulations relating to the granting of rights-of-way under the Act of March 4, 1911, as set forth in 43 CFR, Part 245. Competent legal advice received by the Company was to the effect that such requirements were not "general regulations" authorized under said Act, and that the imposition thereof was without warrant in law.

Ultimately, an additional factor entered into the situation. The original stipulation tendered by the Department was in a letter from the Bureau of Land Management dated October 1, 1948. This letter, however, was not approved by the Acting Secretary of the Interior, and released, until October 14, 1948. On that same day, October 14, the Acting Secretary approved additional stipulations as a part of the Department's regulations, including paragraph (v) of Section 245.21, 43 CFR, Part 245, covering the same subject matter, but differing widely from the stipulations formerly tendered the Company. The new regulations finally appeared in the Federal Register eight days later, on October 22, 1948. Thus, stipulation (v) became a part of the Department's "general regulations" which, if warranted and authorized under the law, would apply uniformly to all easements thereafter granted under said Act of March 4, 1911.

It is apparent, from the above, that had the Company accepted either the original stipulation or the revised one tendered by the Department, and pursuant to such acceptance had proceeded to construct the line, neither of these stipulations could subsequently have been attached to the formal easement when issued, because it would then have been mandatory to insert said paragraph (v) of Section 245.21, 43 CFR Part 245. (See 58 I. D. 607.) Thus it is respectfully observed that on the very day that the Department tendered its original stipulation, it proceeded to render the same void by official promulgation of a so-called "general regulation" (not published until a week later) in essential conflict therewith.

On January 5, 1949, the Company filed with the Secretary of the Interior its request that stipulation (v) be waived in this particular instance. Such application and waiver are specifically authorized and provided for in paragraph 245.21 of the Department's regulations. However, the Company's application for waiver was not acknowledged nor, to our knowledge, acted upon in any way.

[fol. 78] With respect to our objections to the stipulations which were insisted upon by the Department, including said paragraph

(v) as approved October 14, 1948, we wish to point out that the Company's position has been justified by subsequent voluntary action of the Secretary of the Interior. In response to a petition filed by twelve of the larger electric utilities operating in the West, the Secretary courteously granted a hearing on said stipulation (v), before the Solicitor of the Department, which took place in Washington, D. C., on April 25, 1949. On June 15, 1949, the Solicitor submitted a memorandum to the Secretary frankly recognizing the merit of certain of the petitioners' contentions, as a result of which a new and revised stipulation (v) was promulgated by the Secretary on July 18, 1949. Although the new stipulation eliminated certain of the objectionable features of the original one, it introduced an entirely new concept and requirement, under which the Department may increase the capacity of the facilities involved, and thereafter have and retain in perpetuity the use of such capacity, regardless of the Company's original investment, and need for such capacity in supplying its own load requirements. However, we respectfully point out that the controversy over the old 230 KV line application, since withdrawn, which figures so largely in the Secretary's implication of wrongful motives on the part of the Company, was due to the attempted imposition of conditions and requirements which the Secretary has subsequently replaced, on the opinion and recommendation of his own counsel, with others far less objectionable as to the points which were then a controversy.

This is not to contend that the Federal Power Commission may not impose conditions, or require compliance with other agency requirements, in allowing pre-license construction. We respectfully submit, however, that neither the Department of the Interior, nor any agency thereof, has proper authority to require a prospective licensee under the Federal Power Act to procure from it a permit after application for license has been filed, as the price for permission to proceed while application for license is pending; nor to impose conditions which would bind the licensee over and above the license which it seeks to obtain, and which the Federal Power Act itself does not contemplate or authorize. In this case the Company was advised by the Bureau of Land Management that its permission to enter upon lands "under its jurisdiction" would be conditioned upon the requirements of 43 CFR Part 245. As stated above, and also in our answer to the complaint filed against us, the Company respectfully contends that the lands in question are not under the jurisdiction of said Department or Bureau by reason of the provisions of, and our license application pending under, the Federal Power Act, especially in view of Section 24 thereof; and that the imposition of the conditions contained in paragraphs (r), (v) and (x) of Section 245.21, 43 CFR Part 245, as amended, is unauthorized and unwarranted either under the Federal Power Act, the Act

of March 4, 1911, or any other act of or delegation of powers to the Department or Secretary of the Interior by Congress or otherwise.

For the Commission's information, in addition to the copy of complaint and answer in the suit filed against us, we are enclosing copy of the court's findings of fact, conclusions of law and order denying plaintiff's motion for temporary injunction, as on September 9, 1949, filed and entered by the court.

Very truly yours,
A. C. INMAN
Secretary

ACI:mb
Encl.

[fol. 79] BEFORE THE FEDERAL POWER COMMISSION

Proj. No. 1975
Idaho Power Company

Sep 28 1949

The Honorable
The Secretary of the Interior
Washington, D. C.

My dear Mr. Secretary:

Reference is made to the Commission's letter of September 19, 1949 transmitting a copy of a letter dated September 9, 1949 from Idaho Power Company to the Commission with respect to the above-entitled matter.

Inclosed is a copy of a letter dated September 23, 1949 from Mr. M. O. Leighton calling attention to an error in the September 9 letter and requesting that a correction be made in that letter.

If you plan to submit any suggested conditions for inclusion in a license amendment, if authorized, they should be submitted by October 3, 1949.

Sincerely yours,

NELSON LEE SMITH
Chairman

Inclosure No. 29615

Law—JCM:prf—9-27-49

CC: Idaho Power Company
c/o Mr. M. O. Leighton
Washington, D. C.

NLS—9/28/49
Signed Original Mailed
F.P.C. Mail Room—3

FACSIMILE

[redacted]

Proj. No. 1771
Idaho Power Company

SEP 28 1949

The Honorable
the Secretary of the Interior
Washington, D. C.

My dear Mr. Secretary:

Reference is made to the Commission's letter of September 19, 1949 transmitting a copy of a letter dated September 9, 1949 from Idaho Power Company to the Commission with respect to the above-entitled matter.

Inclosed is a copy of a letter dated September 23, 1949 from Mr. M. O. Leighton calling attention to an error in the September 9 letter and requesting that a correction be made in that letter.

If you plan to submit any suggested conditions for inclusion in a license amendment, if authorized, they should be submitted by October 3, 1949.

Sincerely yours,

Helen Lee Smith
Chairman

Inclosure No. 29615

Lee
:ccw:gf
9-27-49

cc: Idaho Power Company
c/o Mr. M. O. Leighton
Washington, D. C.

WWB

WLS 9/25/49

SIGNED ORIGINAL MAILED
MAIL ROOM

[fol. 80] BEFORE THE FEDERAL POWER COMMISSION

United States
Department of the Interior
Office of the Secretary
Washington 25, D. C.

My dear Mr. Smith: Oct 4 1949

This is in answer to the Commission's letters of September 19 and 28, 1949.

The first of these letters (dated September 19) transmitted a letter, dated September 9, 1949, from the Idaho Power Company and added that if there were any conditions which we desired to be incorporated in the amendment of the license for Project No. 1975, provided such amendment is authorized, our suggestions to that effect should be submitted.

The second letter (dated September 28) transmitted a correction of an error contained in the Company's letter of September 9 and added that if we planned to submit any suggestions as conditions to be included in the license amendment applied for, if authorized, such suggestions should be submitted by October 3, 1949.

In our letter to you dated August 10, 1949, we set forth the factual background which led to the trespass by the Idaho Power Company over the public lands involved in the Company's application and the suit filed by the Attorney General to enjoin said trespass. We charged that

(1) the Company was in contempt of the Department of the Interior in flouting its regulations, and was in contempt of the Commission in commencing the construction of the proposed lines in violation of the conditions set forth in the Commission's letter of May 2, 1949;

(2) the application for amendment of the license for Project No. 1975 was not filed in good faith, but in furtherance of the Company's purpose to construct the transmission lines in disregard of the Department's rules and regulations; and

(3) the transmission lines in question were not project lines within the meaning of section 3(11) of the Federal Power Act.

For these reasons we requested that an order be issued requiring the Idaho Power Company to show cause why its application should

not be dismissed. We find nothing in the Company's letter of September 9, as corrected, which should cause us to withdraw these charges.

It would appear that the questions we raised should be disposed of before we are asked to submit our suggestions for conditions to [fol. 81] be incorporated in the license amendment, on the theory that it might be authorized, especially since the matter involves an important question of orderly process of Government. In the action in the U. S. District Court for the District of Idaho, the Company claimed that it was an innocent bystander caught in a conflict between two Government agencies; whereas in truth and in fact, the Company created what has the earmarks of a conflict not intended by the applicable statutes.

Our letter of August 10 was in the nature of an informal complaint within the meaning of section 1.6 of the Commission's Rules and Regulations. This section provides:

> "Although the filing of an informal complaint is without prejudice to the complainant's right to file a formal complaint, only formal complaints submitted and prosecuted under this section will initiate formal proceedings or make complainant a party to any proceedings already initiated, and only formal complaints will be admitted in the record of formal proceedings."

Since it is our desire to be fully heard in this matter, we shall file our formal complaint as expeditiously as possible.

However, since it appears from your last letter that the Commission would like to have our suggestions as to the conditions to be incorporated in the license amendment, before it is decided whether the application should be dismissed for the reasons stated above, we are transmitting such suggestions with the understanding that this should not be taken as an abandonment of our position that the application should be dismissed.

Sincerely yours,

J. A. KRUG
Secretary of the Interior

Hon. Nelson L. Smith, Chairman
Federal Power Commission
Washington 25, D. C.

Enclosure

[fol. 82] BEFORE THE FEDERAL POWER COMMISSION

Project No. 1975—Idaho Power Company

Idaho Power Company
c/o Mr. M. O. Leighton
Consulting Engineer
1518 K St. N. W.
Washington 5, D. C.

Oct 5 1949

Dear. Mr. Leighton

There is transmitted herewith a copy of a letter dated October 4, 1949 from the Secretary of the Interior to the Chairman of the Commission relative to the application of Idaho Power Company for authority to include in the license as parts of Project No. 1975 (Bliss) two proposed transmission lines from the Company's Bliss plant to substations at Boise and American Falls, Idaho, respectively. In addition, the Secretary's letter transmitted certain conditions which the Secretary states should be incorporated in the license amendment, if authorized.

You are invited to submit any comments you may deem appropriate regarding the conditions recommended by the Secretary of the Interior for inclusion in the license if amendment is authorized. Such comments, if any, should be submitted without undue delay.

Very truly yours,

LEON M. FUQUAY
Secretary

Inclosure No. 28006
Law—JCM:szl—10/4/49

[fol. 83] BEFORE THE FEDERAL POWER COMMISSION

IDAHO POWER COMPANY
BOISE, IDAHO
October 5, 1949

Project No. 1975
Idaho Power Company

Federal Power Commission
Hurley-Wright Building
Washington 25, D. C.

Gentlemen:

Response is hereby respectfully made to the Commission's letter of October 5, 1949, inviting Idaho Power Company to submit

comments concerning recommendations made by the Secretary of the Interior, under date of October 4, with respect to conditions for inclusion in license for Project No. 1975, if amendment of said license to include primary transmisssion lines outgoing from Bliss plant be authorized by the Commission.

Concerning that portion of said letter from the Secretary of the Interior renewing charges of contemptuous conduct and bad faith, we again record respectful denial. We add that, even were the Secretary's strictures correct as to a former proceeding before the Department of the Interior, they may not in equity and justice pertain to a subsequent proceeding, in another Federal agency, under other laws, and where the applicant's practices have conformed to said laws. In this latter respect, we invite attention to the recent decision #2691 in the United States District Court for the District of Idaho, Southern Division.

Concerning the conditions suggested for inclusion in license amendment, if authorized, submitted as an appendix to the Secretary's letter of October 4, we beg leave to submit an overlying declaration. Idaho Power Company has in this case filed an application for amendment to an authorized license in strict conformity with the requirements of the Federal Power Act. Moreover, that application was filed in obedience to the intent of the Power Commission as expressed in its authorizing Order entered March 2, 1948, paragraph 23(g). As in many similar applications previously filed, the Company assumed and had good reason to expect that this most recently filed application for amendment would in all respects be appraised according to the terms of said act and the Commission's rules and regulations thereunder, and not according to the requirements of any other act nor according to the rules and regulations of any other Federal agency. Congress enacted the Federal Power Act, after more than 10 years of legislative proceedings, and included therein a body of maturely considered requirements and limitations. Idaho Power Company appeals to and rests its case on that act.

[fol. 84] It is respectfully urged that, with respect to the attributes of primary transmission lines outgoing from licensed power plants, the law defines such attributes and the Commission is the body authorized to appraise and approve or disapprove. We earnestly plead that the primary characteristics of such lines be not determined according to the grievances that may previously have arisen in connection with a case elsewhere. The Bliss lines, for the inclusion of which in license an application is pending, are projected solely to transmit "power therefrom (Bliss plant) to the point of junction with the distribution system or with the inter-

connected primary transmission system." (Sec. 3(11) Federal Power Act.) The projected Bliss lines do this and nothing else.

With respect to the agency of other Federal bodies arising from jurisdiction over "reservations", it is to be noted that Section 4(e) of the Federal Power Act provides that even when "reservations" are included in the Government lands covered by the application, the *Federal Power Commission* (and *not the Department of the Interior or any other agency*) *is the body having jurisdiction to decide whether the license would interfere or be inconsistent with the purpose for which said reservation was created.* Under Section 4(e) of the Act, the Federal Power Commission is "authorized and empowered" to issue licenses for projects "upon any part of the public lands *and reservations* of the United States." The only proviso is

> "That licenses shall be issued within any reservation only *after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created* or *acquired*, and shall be subject to *and contain such conditions as the Secretary of the Department under whose supervision* [as distinguished from "jurisdiction"] such reservation falls shall deem necessary *for the adequate protection and utilization of such reservation.*" (16 U.S.C., sec. 797(e)).

See Defendant's Brief, Civil No. 2691, United States of America vs. Idaho Power Company, U. S. District Court, Idaho, Southern District. It must be obvious that none of the conditions suggested for inclusion in the license for Project No. 1975 are confined to or even approach the purpose of "adequate protection and utilization" of any reservations that are to be crossed by the Bliss lines.

The following comments are tendered with respect to the specific conditions suggested by the Secretary of the Interior:

Concerning A: Again Idaho Power Company is constrained to appeal to the Federal Power Act. No such provision of license as condition A is provided for in that act. While the Company has a 30-year record of successful cooperation with government agencies in the wheeling of power and expects to do likewise in the future, [fol. 85] it must respectfully protest against Condition A as a requirement of license. Already even the threat of it has become noticeable in the Company's financial contacts.

Concerning B: Idaho Power Company respectfully objects to this condition for three reasons:

(1) It is merely a measure in retaliation. It attempts to provide inhibitions and limitations over the long future. If electric utility

service were static as are some other lines of endeavor, serious objections would not attach. Electric transmission concepts and necessities change rapidly, especially in the Idaho territory during the past two years. Two years hence it may be apparent that the requirements of B are wholly wrong.

(2) It is unnecessary. Should the Commission include these lines in the Bliss license, the structures and the functions so approved will be unalterable (F.P.A. Sec. 10(b)) without the Commission's approval, after the filing by the Licensee of an appropriate application for amendment of license. In the meantime, unauthorized alterations of the kind contemplated in B are subject to the penal section of the Power Act. Thus the Act and the Commission remain in control as contemplated by Congress.

(3) It is unlawful in the absence of mutual agreement. Section 6 of the Federal Power Act provides that licenses may be altered or surrendered only upon mutual agreement between the licensee and the Commission.

Very respectfully,

T. E. ROACH
President

[fol. 86] BEFORE THE FEDERAL POWER COMMISSION

Before Commissioners: Nelson Lee Smith, Chairman; Thomas C. Buchanan, Claude L. Draper and Harrington Wimberly.

October 13, 1949

In the Matter of Idaho Power Company

Project No. 1975

ORDER SUPERSEDING ORDER AUTHORIZING ISSUANCE OF LICENSE (MAJOR)

By order dated March 2, 1948, the Commission authorized issuance of a license under the Federal Power Act to Idaho Power Company to authorize construction, operation and maintenance of a proposed major project, to be known as the Bliss development and designated as Proj. No. 1975, on the Snake River in Elmore, Gooding, and Twin Falls Counties, Idaho. The project would occupy lands of the United States.

Although the application for license stated that the project powerhouse would be connected by tap lines to the company's 138-kilovolt transmission network, neither the tap lines nor the switching station from which they emanate were shown to be within the

project boundary on the maps submitted as part of the application for license. The Commission consequently reserved the right to determine at a later date what transmission facilities should be included in the license as part of the project. In addition the order authorized issuance of the license subject to approval by the Secretary of the Army and the Chief of Engineers of such plans of the project structures as may affect navigable capacity.

On April 20, 1949, the applicant filed an application amending and supplementing its original application for license for the project and on July 1, 1949, the last filed application was revised and supplemented. The April 20, 1949, application, as revised and supplemented, seeks to include within the project two proposed 138 kilovolt transmission lines extending from the Bliss plant (of Proj. No. 1975) to substations near Boise and American Falls. The lines would be located in Elmore, Ada, Twin Falls, Gooding, Jerome, Lincoln, Minidoka, Blaine, and Power Counties, Idaho, and would cross lands of the United States.

By letter dated April 26, 1949, the applicant called attention to the urgent need for additional power supply in the area which it serves, stated that immediate construction of the lines was necessary and requested that the Commission give its consent to immediate construction of the lines prior to the formal issuance of an order authorizing construction of the lines as part of Proj. No. 1975. On May 2, 1949, the Commission advised the applicant that pre-license construction of the two 138 kilovolt lines extending from the Bliss power plant to Boise and to American Falls, respectively, at the Applicant's risk, subject to the requirements of the agency or agencies having jurisdiction of the Government lands involved, would not prejudice consideration by the Commission of the application filed April 20, 1949, for inclusion of the lines in the project. After receipt of this letter, the company commenced construction of the lines. The Secretary of the Interior sought to enjoin construction but the United States District Court for the District of Idaho, Southern Division, dismissed the suit, holding the lands to be subject solely to the jurisdiction of the Commission upon the filing of the application covering the lines as provided by Sec. 24 of the Federal Power Act.

[fol. 87] One of the 138 kv lines extends northwesterly from the Bliss power plant a distance of approximately 73 miles, to a point of junction with the applicant's presently existing interconnected primary transmission system at a sub-station located near the city of Boise, and the second 138 kv line extends easterly from the Bliss plant a distance of approximately 116 miles to a point of junction with the applicant's presently existing interconnected primary

transmission system at a substation located near the city of American Falls. According to the application, the two transmission lines will operate at 138 kv, they will not connect to other electric generating plants between Boise and American Falls, and the Bliss plant will not be connected to other transmission lines now in operation in the vicinity of the plant. The lines will be directly connected to the Bliss plant and will carry energy generated at that plant to the aforesaid Boise and American Falls substations. Neither line alone is capable of transmitting the entire output of the Bliss plant and consequently both must be used to transmit power away from the plant.

The two transmission lines referred to, the applicant shows, are to be so constructed that they can without difficulty be converted for operation at 230 kilovolts, although initially they are to be operated at 138 kilovolts. They will cross lands of the United States for a distance of 125.647 miles. The right-of-way over 1.610 miles will be 200 feet in width and the remainder of right-of-way on Government land will be 80 feet in width. The equivalent mileage for a 100-foot right-of-way over lands of the United States for which charges may be assessed will be 102.45 miles.

In order to permit construction of the project at the earliest possible date, the Commission authorized the issuance of the license on March 2, 1948 without having formal approval by the Chief of Engineers of the project plans and prior to the submission by the applicant of plans for the necessary transmission facilities. The applicant proceeded with construction of the power plant which it has practically completed so that within a relatively short time the first three units will be ready for operation.

The Chief of Engineers and the Secretary of the Army have now approved the plans for those project structures affecting navigation and have recommended for inclusion in the license certain conditions in the interest of navigation as hereinafter provided.

[fol. 88] The Secretary of the Interior has requested the inclusion of certain conditions relating to the use of transmission lines, the substance of which is incorporated in the following order relating to those lines.

The Public Utilities Commission and the Department of Fish and Game of the State of Idaho have reported that they have no objection to the project.

The Hydroelectric Commission of Oregon reported that the matter would be considered, but has not submitted any further comment.

Under these circumstances it is appropriate to supersede the order of March 2, 1948 by a complete new authorization covering all of the facilities proposed to be constructed at this time so that the license instrument may issue without delay and the applicant may know what its rights will be under the license authorization.

Construction of the principal project facilities was commenced in the spring of 1948. Consequently, the effective date of the license should be March 1, 1948 rather than the date previously authorized.

The project consists of a concrete dam in lots 5 and 10, Sec. 7, T.6 S., R. 12 E., Boise Meridian, creating a reservoir with a maximum pool elevation of approximately 2,654 feet extending upstream about 5 miles to a point approximately one-fourth mile downstream from the Bliss bridge; a powerhouse integral with the dam with initial installation of approximately 69,000 kilowatts in three units and provision for future installation of a fourth unit; transformers; a switchyard; a transmission line extending from the Bliss plant approximately 73 miles to a substation located near the city of Boise and a second transmission line extending from the plant approximately 116 miles to a substation located near the city of American Falls; and, exclusive of transmission facilities, occupies approximately 509.7 acres of lands of the United States in Elmore, Gooding, and Twin Falls Counties, Idaho.

The Commission *finds:*

(1) The applicant is a corporation organized under the laws of the State of Maine and has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project.

(2) No conflicting application is before the Commission.

(3) Public notice has been given as required by the Federal Power Act

[fol. 89] (4) The project does not affect any Government dam, nor will the issuance of a license therefor as hereinafter provided affect the development of any water resources for public purposes which should be undertaken by the United States itself.

(5) The issuance of a license as hereinafter provided will not interfere or be inconsistent with the purposes of any reservation or withdrawal of public lands of the United States.

(6) Under present circumstances and conditions and upon the terms hereinafter imposed, the project is best adapted to

a comprehensive plan for the improvement and utilization of water power development and for other beneficial public uses, including recreational purposes.

(7) The horsepower capacity hereinafter authorized to be installed in the project is 130,000 horsepower, and the energy generated thereby will be used for public utility purposes.

(8) In accordance with Sec. 10(d) of the Act, the rate of return upon the net investment in the project and the proportion of surplus earnings to be paid into and held in amortization reserves are reasonable as hereinafter specified.

(9) The amount of annual charges to be paid under the license for the purpose of reimbursing the United States for the costs of administration of Part I of the Act, and for recompensing it for the use, occupancy, and enjoyment of its lands used for transmission-line right-of-way is reasonable as hereinafter fixed and specified; and the annual charge for recompensing the United States for the use, occupancy, and enjoyment of its lands (exclusive of those used for transmission line right-of-way) shall be hereafter determined.

(10) The maps, plans, and statements filed as part of the application and designated as Exhibit "J-1" (FPC No. 1975-13) excepting the tables of project area, Exhibit "J-2" (FPC Nos. 1975-24 and -25), Exhibit "K-2" (FPC Nos. 1975-26, -27, -28, and -29), Exhibit L (FPC Nos. 1975-9, -10, -11, and -12), Exhibit "L-2" (FPC No. 1975-23), and Exhibit M amended April 15, 1949, respectively, conform to the Commission's rules and regulations and should be approved as part of the license for the project.

(11) The maps filed as part of the application and designated as Exhibit "K-1" (FPC Nos. 1975-16, -17, and -18) do not show the project boundary around the reservoir lands by a metes-and-bounds survey. These maps and Exhibit F, statement of the nature, extent, and ownership of land and land rights, should be revised in accordance with the Commission's rules and regulations, and filed as hereinafter provided.

[fol. 90] (12) The aforesaid transmission lines leading from the Bliss plant to substations near American Falls and Boise are primary lines and are essential parts of the project as defined in Sec. 3(11) of the Federal Power Act,

and therefore are subject to the licensing authority of the Commission.

The Commission *orders:*

(A) A license effective as of March 1, 1948, shall be issued to the applicant for a period of fifty years for the construction, operation, and maintenance of major Project No. 1975 subject to the provisions of the Federal Power Act and the rules and regulations thereunder.

(B) The license shall contain the usual conditions and provisions for licenses issued under Sec. 4(e) of the Act for such projects and the following special provisions:

(1) The licensee shall commence construction of the project within four months from the effective date of the license and shall complete said construction for the operation of three generating units on or before July 1, 1950.

(2) At such time as the Commission may direct, provided that it is economically sound and in the public interest to do so, after notice and opportunity for hearing, the Licensee shall install the fourth generating unit.

[fol. 91] (3) upon completion of the project the licensee shall file with the Commission revised Exhibits F and K for the reservoir prepared in accordance with the Commission's rules and regulations.

(4) The United States specifically retains and safeguards the right to use water in such amount, to be determined by the Secretary of the Army, as may be necessary for the purposes of navigation on Snake River; and the operations of the licensee so far as they affect the use, storage, and discharge from storage of waters affected by this license, shall at all times be controlled by such reasonable rules and regulations as the Secretary of the Army may prescribe in the interest of navigation, and as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes; and the licensee shall release water from the project reservoir at such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the Secretary

of the Army may prescribe in the interest of navigation, or as the Commission may prescribe for the other purposes hereinbefore mentioned.

(5) The operation by the licensee of the project works so far as such operation involves the use, storage, and discharge from storage of waters of the Snake River at this project, shall at all times be controlled by such reasonable rules and regulations as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes; and the licensee shall release water from the project reservoir at such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the Commission may prescribe for the purposes hereinbefore mentioned.

(6) Should the project works be damaged or the power output of the project be reduced by subsequent upstream diversion of the waters of the Snake River by the United States in connection with its irrigation and conservation program, then the United States shall have the option, in full settlement of any and all claims by the licensee, of paying such damages as the licensee shall be then entitled to recover as a matter of law, or of acquiring the licensee's project as provided by the Federal Power Act.

[fol. 92] (7) Whenever the United States desires to construct any navigation facilities in connection with the project the licensee shall convey to the United States, free of cost such of its lands and its rights-of-way and such right of passage through its dam or other structures and permit such control of pools as may be required to complete such navigation facilities.

(8) The licensee shall furnish free of cost to the United States power for the operation of such navigation facilities when constructed.

(9) Installation of structures and operations designed to maintain the fishery value of the project, such as ladders, screens, and hatcheries, need not be made until the need for such devices has been determined

by the Fish and Wildlife Service. It will then be the obligation of the licensee to install them.

(10) Practical means of mitigating the losses to fish and wildlife resources occasioned by the construction and operation of the proposed project, of increasing the biological productivity of the project area, and of furthering its public use for recreational enjoyment should be developed by cooperative agreements between the licensee and the Idaho Fish and Game Department and the Fish and Wildlife Service.

(C) The license shall provide that after the first 20 years of operation of the project under the license six (6) percent per annum shall be the specified rate of return on the net investment in the project for determining surplus earnings and for the establishment and maintenance of amortization reserves pursuant to Sec. 10(d) of the Act; one-half of all earnings in excess of six (6) percent per annum shall be paid into such amortization reserves, and such amortization reserves shall be established, maintained, and disposed of in accordance with the terms of the Act and such rules, regulations, and orders of the Commission as may be adopted pursuant thereto.

(D) Subject to the provisions of Sec. 10(e) of the Act and the rules and regulations of the Commission thereunder, the licensee shall, effective as of March 1, 1948, pay to the United States the following annual charges:

(1) For the purpose of reimbursing the United States for the costs of administration of Part I of the Act, one (1) cent per horsepower on the authorized installed capacity (130,000 horsepower), plus two and one-half (2½) cents per 1,000 kilowatt-hours of gross energy generated by the project during the calendar year for which the charge is made;

[fol. 93] (2) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of its lands (exclusive of those used for transmission-line right-of-way), an amount to be hereafter determined; and

(3) For the purpose of recompensing the United States for the use, occupancy, and enjoyment of its lands used only for transmission-line right-of-way, $819.60.

(E) The exhibits specified in paragraph (10) above be and they are hereby approved as part of the license.

(F) The construction and operation of the transmission lines from the Bliss plant to substations near American Falls and Boise shall be subject to the following special conditions:

(1) The licensee shall not convert said lines to permit operation at a higher voltage without prior approval of the Commission. Upon the request of the Secretary of the Interior under appropriate authority, the licensee shall, after notice of at least one year from the Commission and within the time fixed by the Commission, convert said lines for operation at a voltage of 230 kv at the expense of the United States.

(2) After the initial construction of the lines or upon conversion of the lines to a higher voltage as herein provided, the licensee shall permit the United States, and the United States shall have the right to interconnect any of its transmission facilities with said lines in a manner conforming to approved standards of practice for the interconnection of transmission circuits provided there is capacity available in said line or lines in excess of the needs of the licensee. The expense of such interconnection, including the expense of additional switching, relaying, and other protective devices, shall be borne by the United States, provided, however, that no such interconnection may be made without the prior approval of the Commission.

(3) Upon completion of any such interconnections, the United States shall have the right to transfer energy over said lines as initially or ultimately constructed in such amounts as will not unreasonably interfere with the licensee's use of said lines provided that the licensee shall be obligated to allow the transmission over the said lines by the United States of electric energy only to consuming facilities of the United States and to public bodies and cooperatives entitled to statutory preference in connection with the distribution and sale of electric energy by the United States.

[fol. 94] (4) After any such interconnection of the facilities of the United States with said lines the licensee shall, except in emergencies, maintain in a closed position all connections under the licensee's control

between the licensee's lines and the interconnecting facilities provided by the United States.

(5) Any interconnected power systems of the United States and the licensee shall be operated in parallel and in such manner as to render good and adequate service. Any inadvertent flow of energy from the lines of the United States into said lines or from said lines into the lines of the United States which may occur while the lines of both the licensee and the United States are electrically interconnected shall mutually be compensated for by later return in kind. Any scheduled transfer of energy over said lines for the account of the United States shall be settled for or any investment in said lines made by the United States shall be liquidated, on reasonable terms under agreements which shall be negotiated between the licensee and the United States, said agreements to be subject to approval by the Commission.

(6) Until such agreements are completed, settlement for any such scheduled transfers of power shall be made on the following basis. If power and energy from the lines of the United States is transmitted over these lines, the monthly payment for such transmission shall be the amount of dollars representing that part of the monthly cost to the licensee of the section of the line or lines over which the power and energy is transmitted which the maximum transmission by the United States in kilowatts during the month bears to the kilowatt capacity of such section of line or lines. The monthly cost to the licensee referred to herein shall be computed in conformity with the uniform system of accounts prescribed by the Commission.

(7) In the event the licensee, its successors or assigns, during any period in which the United States is transmitting power over these lines, shall require reciprocal accommodations for the transfer of power from these project lines over any lines of the United States connected to said lines of the licensee, such reciprocal accommodations shall be accorded to the licensee under like terms and conditions as herein provided for the transfer of power from the lines of the United States over said lines of the licensee.

[fol. 95] (8) If, at any time subsequent to the date upon which the licensee commences the transmission of energy over said lines for the United States, the licensee notifies the Commission that the licensee needs for the transmission of electric energy in connection with its operations the whole or any substantial part of the capacity of the said lines, or part thereof, then being utilized by the United States, and the licensee makes satisfactory provision for reimbursement to the United States of the original cost to the United States of the facilities desired by the licensee, less accrued depreciation on the investment of the United States, the licensee may modify or revoke the then existing agreement to remain interconnected and to transmit energy for the United States by giving to the Commission 30 months' notice, of the licensee's intention to utilize additional capacity or the entire capacity of the lines, or part thereof, as the case may be, provided, however, that the United States may continue to utilize any capacity in the said lines to the extent that said capacity, if any, was provided by the United States at its expense without reimbursement by the licensee.

(9) If at any time in the future the said lines of the licensee are proposed for alteration or are altered, the Commission reserves the right, after 30 days' notice and opportunity for hearing, to make a determination as to whether the lines after such alteration, either proposed or actual, will be subject to licensing by the Federal Power Commission under the then existing laws and regulations, and in the event that the Commission finds that the said alteration in the lines, either proposed or actual, so changes the functions served by said lines and the source of energy transmitted over said lines as to make them, or any part of them, not subject to the licensing authority of the Commission under the then existing laws and regulations, the licensee hereby agrees to secure authority for the continued operation and maintenance of the lines, or such part of the lines, from the appropriate agency of the United States then having jurisdiction over the lands of the United States occupied by the lines, or part thereof, and upon securing said authority, the licensee hereby agrees to surrender the license insofar as it authorizes operation and maintenance of the lines, or such parts thereof, which are

found to be no longer subject to Commission jurisdiction. In the event that the licensee should fail to surrender the license insofar as it is applicable to the lines, or parts thereof, which may then be found by the Commission not to be subject to its jurisdiction, the Commission reserves the right to take appropriate action to have the license terminated with respect to said lines, or parts thereof, as provided in the then existing laws and regulations.

[fol. 96] (10) Any agreement between the licensee and the United States in connection with said transmission lines or related facilities shall be effective only upon approval by the Commission. In the event the licensee and any agent of the United States are unable to agree with respect to any matter arising in connection with said transmission lines or related facilities, the question thereby raised shall be submitted to the Commission for determination.

By the Commission.

LEON M. FUQUAY,
Secretary.

Date of Issuance: October 13, 1949

[fol. 97] BEFORE THE FEDERAL POWER COMMISSION

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington 25, D. C.

Project No. 1975

Oct 13 1949

My dear Mr. Smith:

We are transmitting herewith the original and 19 copies of a formal complaint in the Matter of the Idaho Power Company, which we are filing in order to protect our procedural rights before the Commission, as well as the procedural rights of the Government in the case of *United States* v. *Idaho Power Company* (Civil Action No. 2691, United States District Court for the District of Idaho).

Pursuant to our conference of October 6 last, there have been discussions between your representatives and representatives of

this Department, but it appears that some substantial differences of view between the two groups have developed with respect to the conditions that should be inserted by the Commission in the license amendment applied for by the Idaho Power Company. We understand that your representatives will submit our propositions to the Commission. We request that our representatives be given an opportunity to confer with the Commission on these propositions if they appear unacceptable to the Commission on preliminary consideration.

Should it later appear that the interests of this Department will be fully safeguarded by whatever conclusions the Commission arrives at, we shall, of course, move that our complaint be dismissed.

Sincerely yours,

J. A. KRUG

Secretary of the Interior

Hon. Nelson L. Smith, Chairman
Federal Power Commission
Washington 25, D. C.

Enclosures 20

[fol. 98] BEFORE THE FEDERAL POWER COMMISSION

In the Matter of

IDAHO POWER COMPANY

Project No. 1975.

COMPLAINT—Received October 13, 1949

To the Honorable
The Federal Power Commission:

Comes now Julius A. Krug, Secretary of the Interior, complainant herein, and brings this complaint against the Idaho Power Company (hereinafter sometimes referred to as the "Company"), and states as follows:

1. The complainant is the Secretary of the Interior and the head of the Department of the Interior, one of the executive departments of the United States Government.

2. The Department of the Interior, through its Bureau of Land Management, has been and is in charge of, and exercises jurisdiction over, certain public lands involved in this proceeding.

3. The Secretary of the Interior has, for some time, been interested in, and concerned with, the supply of power in the southern part of the State of Idaho. The Federal Government has hydroelectric projects in the area, and other Federal hydroelectric projects are either under construction or have been authorized to be constructed. The Secretary of the Interior has been vested by [fol. 99] statute with the authority and responsibility respecting the marketing of the power generated at these projects. In April 1948, the Bureau of Reclamation and the Bonneville Power Administration, agencies of the Department of the Interior, made and submitted a joint report entitled "Report on Availability of Power in Southern Idaho for Development of Phosphate Industry," wherein they proposed that the United States construct, own, and operate a transmission line which would connect the eastern and western parts of the Southern Idaho region. This report was transmitted to the Idaho Power Company with a request for a conference to explore the possibility of cooperative arrangements in order to supply power for potential phosphate producers as soon as possible.

4. Before any substantial discussion took place, the Company, of June 9, 1948, applied to the Bureau of Land Management for an advance construction permit to construct a transmission line over certain public lands in advance of a formal application for a right-of-way pursuant to the Department's rules and regulations. On December 22, 1948, it filed an application for the grant of an easement for a right-of-way over said lands.

5. The proposed transmission line was to be a 230 KV line and was to extend over a distance of approximately 200 miles between Boise and American Falls, Idaho. The right-of-way desired by the Company over the said public lands would constitute more than half of the entire right-of-way required for said line. The total [fol. 100] cost of the line, including the 230 KV terminal facilities, was estimated at approximately $4,000,000. However, the Company proposed to operate this line initially at 138 KV and thus to defer installation of 230 KV terminal facilities.

6. The transmission line for which the Company sought a permit or easement from the Bureau of Land Management, whether regarded as one line from Boise to American Falls, or as two lines from Boise to Hagerman and from Hagerman to American Falls, was intended as a major trunk line, not as a project line.

7. After the filing of the application for a preconstruction permit, extensive negotiations followed, in which the representatives of the Secretary took the position that, if public lands of the United States were to be used by the Company for the construction of such an important part of the future power system of the region, the public interest required that the ownership and operation of this line by the Company should not interfere with, but should complement, the later development of Federally owned power generating and marketing facilities, and that there should be no wasteful duplication of transmission facilities. Since the Company had not shown a present need for a 230 KV line, the Secretary of the Interior proposed to grant a preconstruction permit and later an easement for the necessary right-of-way, subject, however, to the right of the Government to transmit its power over this line to the extent of the unused capacity of the line, upon [fol. 101] the payment of an equitable share of the operation and maintenance costs proportionate to the capacity used by the Government. Through all the negotiations with the representatives of the Secretary of the Interior, the Company resisted the condition sought to be imposed, namely, that the unused capacity of the line might be utilized by the Government for the transmission of its power upon payment of just compensation.

8. On April 11, 1949, the Company withdrew its application for a permit or easement, for the alleged reason (later stated by its representative in a letter to the Bureau of Land Management, dated May 27, 1949) that on March 2, 1948 the Federal Power Commission had issued a license for Project No. 1975, containing a provision, among others, that Commission reserved the right to determine at a later date what transmission facilities should be included in the license as part of the project.

9. On April 20, 1949, the Company filed an application with the Commission to amend its license for Project No. 1975 by including therein two 138 KV transmission lines, of which one would extend from the project to Boise, Idaho, a distance of some 73 miles, and the other would extend from the project to American Falls, Idaho, a distance of some 116 miles.

10. On April 26, 1949 the Company, by a letter to the Federal Power Commission, requested that it be granted pre-license permission to commence the construction of these transmission lines. On [fol. 102] May 2, 1949 the Commission advised the Company that pre-license construction of these lines at the Company's own risk, and "subject to the requirements of the agency or agencies having jurisdiction over the Government lands involved," would not prejudice the Commission's consideration of the appli-

cation filed on April 20, 1949, for inclusion of these lines in the project. The effect of this advice was that the Commission gave no permission to the Company to occupy the lands of the United States in order to construct these lines and that, before occupying any public lands of the United States with these lines, the Company was under a direct obligation to obtain the permission of the Department of the Interior, although, even then, the Company was to assume all the risk of the construction.

11. Notwithstanding the conditions set forth in the letter of the Commission dated May 2, 1949, the Company willfully, unlawfully, illegally, and without any permit from the Secretary of the Interior, or from anyone acting under his authority, entered and trespassed upon the said public lands, and commenced the construction of the said transmission lines thereon, all with the intent, purpose, and effect of evading the jurisdiction of the Secretary of the Interior over the said public lands. In doing so, the Company acted in violation of the advice given to it by the Commission, and in violation of the rules and regulations of the Department of the Interior and in contempt of both the Secretary of the Interior and the Federal Power Commission.

[fol. 103] 12. The two 138 KV lines covered by the Company's application for amendment of its license for Project No. 1975 constituted substantially the same line for which the Company had negotiated with the Department of the Interior in its application for a permit or easement for a right-of-way for its 230 KV line referred to in paragraphs 4 through 6 hereof.

The Secretary of the Interior further alleges that the application for amendment of the license for Project No. 1975 was not filed in good faith, but that the purpose of the said application was solely to invoke the regulatory jurisdiction of the Commission in order to oust the jurisdiction of the Secretary of the Interior, and to avoid the requirement of law that such transmission lines could be constructed on public lands only after obtaining a permit or easement from the Secretary of the Interior in accordance with the rules and regulations of the Department of the Interior.

13. The Secretary further alleges that the two 138 KV lines which are the subject of the Company's application are not project lines, in that

(a) The said lines are not "tap lines" which the Company sought to include in its application for a license for Project No. 1975, but are, and are intended to be, trunk lines which will serve as a part of the Company's interconnected transmission system, and

[fol. 104] (b) From the drawings submitted with the Company's application for amendment of the license, it appears that the two transmission lines are not intended to be and remain 138 KV lines, but are intended to be converted later for operation as 230 KV lines and that the capacity of such 230 KV lines will be far in excess of the capacity of the project (Bliss plant).

14. The Secretary of the Interior further states that if the said two 138 KV lines, without interconnections with the Company's transmission system except at Boise, Idaho, and American Falls, Idaho, were regarded as project lines, they would be unreliable in case of outages, would lack flexibility of operation, and would be economically unsound. On the other hand, if these two lines, or the project itself, were so interconnected with the Company's transmission system as to provide for reliable, flexible, and economical operation, the lines from the project to such points of interconnection (not the two 138 KV lines which are the subject of the present application) would constitute project lines.

WHEREFORE, the Secretary of the Interior respectfully requests that the application of the Idaho Power Company be dismissed or denied.

Respectfully submitted,

J. A. KRUG
Secretary of the Interior

MASTIN G. WHITE
Solicitor of the Department of the Interior

GREGORY HANKIN
Of Counsel

[fol. 105] BEFORE THE FEDERAL POWER COMMISSION

Washington, D. C.

In the Matter of

IDAHO POWER COMPANY

Project No. 1975

PETITION FOR REHEARING—Received November 10, 1949

Idaho Power Company (hereinafter referred to as Applicant) hereby applies, pursuant to the provisions of Section 313(a) of the Federal Power Act (hereinafter referred to as the Act), and Section 1.34 of the Commission's Rules of Practice and Procedure, for a rehearing on the Commission's "Order Superseding Order Authorizing Issuance of License (Major)," dated and issued October 13, 1949, in the above entitled proceeding, upon the grounds hereinafter set forth:

The Commission erred in inserting and imposing upon Applicant in said Order the conditions contained in Paragraph F, subparagraphs 1-10 inclusive, and in requiring that the construction and operation of the transmission lines from the Bliss plant to substations near American Falls and Boise shall be subject to said conditions. Applicant respectfully alleges that said conditions and requirements are illegal and invalid, and beyond the jurisdiction, power or authority of the Commission to impose, for the following reasons:

A. Said conditions and requirements constitute administrative legislation, contrary to the Constitution (Article I, Section 1) and laws of the United States.

B. Said conditions and requirements are in violation of rights guaranteed under the Fifth Amendment to the Constitution of the United States, in that said regulations would deprive Applicant of its property without due process of law, and take the property of Applicant for public use without just compensation.

C. The conditions and requirements of Paragraph F(9) would subject Applicant, and its property, to *ex post facto* laws and regulations, in violation of Sections 6 and 28 of the Act, and contrary to the Constitution (Article I, Section 9) of the United States; and to the revocation, alteration or sur-

render of said license, with respect to said transmission lines, in violation of Section 6 of the Act.

[fol. 106] D. Said conditions and requirements are not authorized under either Section 4(e) or 10(g), or under any other provision of said Act, or of any other law, in that, among other things, said conditions and requirements are not related to or necessary for "the adequate protection and utilization of such reservation," if any, as may be involved in the licensing of said transmission lines, and are "inconsistent with the provisions" of said Act.

E. Said conditions and requirements, and the imposition and inclusion thereof in said Order of October 13, 1949, are not in accordance with law in that the same are not authorized by any statute, or supported or justified by any evidence, or by any relevant finding or reason therefor contained in said Order or otherwise.

F. Said conditions and requirements are unreasonable and arbitrary, and constitute abuse of discretion, for the reasons set out in D and E hereof, and also, among other things, in the following respects:

(a) Paragraph F(1), in the requirement that Applicant, upon request of the Secretary of the Interior, shall convert Applicant's said lines for operation at a voltage of 230 kv.

(b) Paragraph F(3), in that said requirements and conditions would compel Applicant to permit the use of its own facilities, and would permit the United States to use Applicant's facilities, in competition with Applicant, and in a manner and under conditions which constitute an unreasonable and unlawful discrimination against Applicant and Applicant's customers.

(c) Paragraph F(6), in that no interconnections, transfers of power, or settlements therefor, should be required of Applicant, or permitted, until and after the negotiation and execution of agreements therefor, setting forth specifically the terms and conditions with respect thereto, as provided for in Paragraph F(5) of said Order, prior to the making of any interconnection with the lines and facilities of Applicant.

[fol. 107] Paragraph F(8), in that the requirement of 30 months notice for withdrawal of capacity is grossly

and unreasonably excessive, especially where the line and facilities involved are provided solely by Applicant, and at Applicant's investment and expense, for supplying the service needs and electrical demands of Applicant's customers and the public. Need for such withdrawal of transmission capacity will arise because of immediate or pending customer demand upon the transmission lines here involved. Delay of 2½ years would, in fact, prevent Applicant from providing adequate facilities and service to the public, as required of Applicant, as a public utility, by and under the laws of the States of Idaho, Oregon and Nevada, in which Applicant serves, and, moreover, in consequence and as a direct result of a limitation imposed by the Commission itself; and said requirement is also inconsistent and in conflict with the requirements, purposes and provisions of Section 207 of the Act. Said 30-months requirement is therefore against the public interest and welfare, and inconsistent with the main purposes of the Bliss license and the Act. Said 30 months requirement would also prevent the Company from meeting such service requirements and conditions as would necessitate the future installation and utilization of a fourth generating unit in said project, as provided for in paragraph B(2) of said Order.

(e) Said conditions and requirements are arbitrary and unreasonable, in that the same are so indefinite and uncertain that neither the Commission, the United States, nor the Applicant is or can be advised as to rights and liabilities which may arise thereunder, with reference particularly to (1) the making of interconnections by the United States to and with said lines of Applicant (F(2) of Order), and the operating responsibilities and liabilities arising out of such interconnections, and the sub- [fol. 108] sequent operation of said lines; (2) the meaning of "capacity available in said line or lines in excess of the needs of the licensee" (F(2) of Order); (3) what shall constitute "unreasonable" interference with the licensee's use of said lines (F(3) of Order); and (4) conditions with respect to supplying of service to the respective customers of the United States and the licensee in times of insufficient capacity, generation or transmission outages, or other emergency conditions.

WHEREFORE, Applicant respectfully requests that the Commission grant a rehearing in respect of its said Order of October 13,

1949, and that paragraph F, in its entirety, be abrogated and deleted therefrom.

Respectfully submitted,

IDAHO POWER COMPANY

BY A. C. INMAN

Vice-President

A. C. INMAN

Address: 1220 Idaho Street
Boise, Idaho

Attorney for Idaho Power Company

Duly sworn to by A. C. Inman jurat omitted in printing.

[fol. 109] BEFORE THE FEDERAL POWER COMMISSION
UNITED STATES

DEPARTMENT OF THE INTERIOR
OFFICE OF THE SECRETARY
Washington 25, D. C.

Nov 17 1949

Dear Mr. Smith:

I wish to express the appreciation of this Department for the opportunity we had to discuss the Idaho Power Company matter with your Commission and your staff. After careful study of the Commission's order of October 13, granting the Company's application to include the two 138 KV transmission lines in Project No. 1975 upon the conditions therein contained, we feel that a great forward step has been taken in the protection of the Government's interests.

The principle that transmission facilities constructed over Government lands should be made available, to the extent of their unused capacity, to the United States upon reasonable terms is important both to the utilities and to the United States. It is important to the utilities, because it means that transmission capacity will not be wasted and that there will be a more economical use of transmission facilities in the public interest. It is important to the United States, because it means avoidance of wasteful duplication of facilities, and therefore, more economical development and

utilization of the vast potential hydroelectric resources in the Western States.

As you know, the Idaho Power Company made every effort to escape substantially the same requirements of this Department covering the use of public lands for the construction of transmission lines. It is, therefore, most gratifying that the Commission moved so promptly in applying the principle of uniformity of governmental purpose, by making it impossible here for this or any other company to submit to the jurisdiction of one agency of Government as an escape or protection from another. We construe section (F) of the order to mean that none of its provisions would operate automatically in favor of the Company, or as enabling it to employ tactics to defeat or delay the use of the facilities by the United States. Unless this is the meaning and effect of this section, the supervision retained by the Commission to effectuate this order may be employed to defeat its purposes, and businesslike arrangements between the Government and the Company may be avoided through costly and expensive proceedings before the Commission.

In some respects, the order does not in plain words give the full assurance we should like to have, that the transmission facilities involved would fit into the future power system of the region. Our [fol. 110] regulations contemplate that such transmission lines would not interfere with the Government's program for marketing power from its projects. We are confident that the order has a similar objective. With this in mind, we construe paragraphs (8) and (10) of section (F) to mean that the thirty months' notice (required in paragraph (8)) is for the purpose of giving the Commission time to investigate and determine (under paragraph (10)) the Company's need of the transmission capacity then used by the Government, and that such notice does not operate automatically to preclude further use of the lines by the United States, if, in fact, there is capacity available, or that could be made available, for use by the Government. Unless this construction is correct, there would be serious doubt as to whether the United States would in any circumstances be justified in investing in substations and other facilities needed to utilize these lines.

It would appear from paragraph (3) of section (F) that the order imposes a greater limitation on the use which the Government might make of the transmission facilities than there would be under the regulations of this Department. This may create some obstacles to the full employment of the power resources of the region in the development of the vast phosphate deposits to provide cheap fertilizer for western lands. We are confident that, if issues of this kind develop, we shall have the full cooperation of the Commission in meeting them.

It is my understanding, on the basis of my personal conversation with counsel for the Commission, Mr. Willard W. Gatchell, that, unless precluded by the Courts, the Commission will require the Company to accept the terms of the license and the obligations to the United States thereunder. We assume that, if the Commission is precluded from requiring any conditions of the order, the lands involved will be returned to the jurisdiction of this Department so that the terms of our regulations may be put into effect. It is with this understanding, and with our appreciation for the careful consideration given by the Commission to the interests of this Department and of the public, that I am advising you of this Department's full cooperation in rendering the Commission's order most effective to the end that the public interest will be protected.

Sincerely yours,

J. A. KRUG

Secretary of the Interior

Hon. Nelson Lee Smith, Chairman

Federal Power Commission

[fol. 111]

Project No. 1975

Nov 28, 1949

Honorable J. A. Krug
Secretary of the Interior
Washington, D. C.

Dear Secretary Krug:

Thank you for your letter of November 17 with respect to the license conditions prescribed in the Commission's order of last month for construction and operation of two transmission lines leading from the Bliss plant of the Idaho Power Company, Project No. 1975.

You are correct in understanding that the Commission, unless precluded by the courts, intends to require the company to accept the terms of the license, although if the Commission is found to be without jurisdiction, the lands will be returned to the Department of the Interior.

Sincerely yours,

CLAUDE L. DRAPER
Acting Chairman

Law
WWG:prf
11-21-49

FACSIMILE

Project No. 1975

NOV 28 1949

Honorable J. A. Krug
Secretary of the Interior
Washington, D. C.

Dear Secretary Krug:

Thank you for your letter of November 17 with respect to the license conditions prescribed in the Commission's order of last month for construction and operation of two transmission lines leading from the Bliss plant of the Idaho Power Company, Project No. 1975.

You are correct in understanding that the Commission, unless precluded by the courts, intends to require the company to accept the terms of the license, although if the Commission is found to be without jurisdiction, the lands will be returned to the Department of the Interior.

Sincerely yours,

Claude L. Draper
Acting Chairman

SIGNED ORIGINAL MAILED
F.P.C. MAIL

[fol. 112] BEFORE THE FEDERAL POWER COMMISSION

Washington, D. C.

In the Matter of

IDAHO POWER COMPANY

Project No. 1975

MODIFICATION OF PETITION FOR REHEARING—NOVEMBER 30, 1949

Idaho Power Company hereby respectfully modifies its Petition for Rehearing, filed with the Commission on November 10, 1949, in the above-entitled proceeding, by deleting therefrom, following the word "statute" in paragraph E thereof, the words "or supported or justified by any evidence, or by any relevant finding or reason therefor contained in said Order or otherwise."

Respectfully submitted,

IDAHO POWER COMPANY

By A. C. INMAN

Vice President

A. C. INMAN

Address: 1220 Idaho Street
Boise, Idaho
Attorney for Idaho Power Company

Duly Sworn to by A. C. Inman

[fol. 113] BEFORE THE FEDERAL POWER COMMISSION

Before Commissioners: Nelson Lee Smith, Chairman; Thomas C. Buchanan and Claude L. Draper.

In the Matter of

IDAHO POWER COMPANY

Project No. 1957

ORDER EXTENDING TIME FOR ACTION UPON PETITION FOR REHEARING—DECEMBER 13, 1949

The Idaho Power Company on November 10, 1949, filed a petition for rehearing on the Commission's order of October 13, 1949, authorizing inclusion of certain transmission facilities as parts of

the project works and superseding authority previously granted for construction of the Bliss project on the Snake River in Idaho, Project No. 1975.

In addition to its formal presentation, the company has made certain informal presentations and the Secretary of the Interior has filed a formal complaint urging dismissal of the application for license, a formal statement in opposition to the rehearing requested, and informal letters commenting upon and seeking modification of certain provisions of the order of October 13, 1949.

The Commission *finds:*

Further consideration is desirable of the questions raised in connection with said order of October 13, 1949.

The Commission *orders:*

Further action on the petition for rehearing and the informal presentations is hereby postponed for a period not to exceed 30 days from date of issuance of this order.

By the Commission.

LEON M. FUQUAY,
Secretary.

Date of Issuance: December 14, 1949

[fol. 114] BEFORE THE FEDERAL POWER COMMISSION

Before Commissioners: Nelson Lee Smith, Chairman; Thomas C. Buchanan, Claude L. Draper, Mon C. Wallgren and Harrington Wimberly.

In the Matter of

IDAHO POWER COMPANY

Project No. 1975

ORDER MODIFYING ORDER OF OCTOBER 13, 1949 AUTHORIZING ISSUANCE OF LICENSE (MAJOR)

January 18, 1950

Having nearly completed the construction of its Bliss plant on the Snake River in Idaho, licensed as Project No. 1975, the Idaho Power Company, licensee, applied for inclusion among the project facilities of two transmission lines leading from that plant to Boise and American Falls. Inclusion of the lines as part of the project facilities was authorized by the Commission's order of October 13,

1949, which superseded authority previously granted for the development.

A formal petition for rehearing on the order of October 13, 1949, was filed by the applicant on November 10, 1949, and modified on November 30, 1949, by striking specified language in the petition. In addition, the applicant filed an informal letter requesting modification of certain provisions in the order. Both the formal petition and letter have been considered. The Secretary of the Interior also filed an informal letter commenting upon the order, a formal complaint urging dismissal of the application for license, and a formal statement in opposition to the rehearing requested by the company, and his comments both formal and informal have been considered. While no formal hearing has been held on the application for either the Bliss plant or the transmission lines, the company does not request that it be given a formal hearing aside from consideration of the modifications which it suggests in particular paragraphs of the order.

Under paragraph F (8) of the order of October 13, 1949, the licensee can repossess transmission line capacity after notice of thirty months. The licensee suggests that, in the event it was informed that some customer desired additional capacity within a shorter period, the thirty months' notice requirement might interfere with use of its facilities to serve its own customers in accordance with its public utility obligations. The Secretary suggests that the termination notice is for the purpose of giving the Commission time within which to investigate and determine the requirements of the licensee, but that it should not operate automatically to preclude further use by the United States of spare capacity on the lines. He also calls attention to the substantial investment which the United States must make in order to use spare capacity on these lines and asks that this investment not be jeopardized.

[fol. 115] Since this termination notice will not operate automatically so as to preclude further use by the United States of spare capacity on these transmission lines, and any investigation and decision by the Commission may be completed in a much shorter period than thirty months, a termination notice of twenty-four months would be sufficient. This shorter period should also provide sufficient time within which the United States could construct substitute capacity for lines which the licensee has built in less than eight months.

Paragraph B (9) of the order of October 13, 1949, does not make it clear that upon the order of the Commission and after its determination in the case of dispute between the licensee and the Fish and Wildlife Service, the licensee shall construct appropriate facilities

for the protection of fish life. That paragraph should be amended accordingly.

The Secretary of the Interior also filed an informal request for inclusion of a license condition that the transmission facilities authorized should not interfere with the reclamation projects, but that if necessary the licensee should move or adapt obstructing facilities at its own expense. The standard license conditions imposed upon projects crossing lands of the United States provide for reasonable use by Federal agencies of such lands as are within the project boundary, but do not require the licensee to bear the expense of relocating obstructing facilities.

The Commission *finds:*

(1) Amendment of paragraphs B (9), F (7), and F (8) of the order of October 13, 1949, as hereinafter provided, is appropriate and in the public interest, but further amendment of that order is not desirable at this time.

(2) The petition of the applicant for rehearing, referred to, as modified, should be denied.

(3) The request of the Secretary of the Interior for modification of the order of October 13, 1949, for the further protection of the reclamation projects should be denied.

(4) The formal complaint filed October 13, 1949, by the Secretary of the Interior should be dismissed.

The Commission *orders:*

(A) Paragraph B (9) of the order of October 13, 1949, herein is modified to read as follows:

"(9) Installation of structures and operations designated to maintain the fishery value of the projects, such as ladders, screens, and hatcheries, need not be made until the need for such devices has been determined by the Commission upon the recommendation of the Fish and Wildlife Service and an appropriate order therefor has been issued by the Commission."

[fol. 116] (B) Paragraph F (7) of the order of October 13, 1949, herein is hereby modified to read as follows:

"(7) In the event the licensee, its successors or assigns, during any period in which the United States is transmitting power over these lines, shall require reciprocal accommodations for the transfer of power from these project lines over any lines of the United States connected to said lines of the licensee, such reciprocal

accommodations shall be accorded to the licensee under like terms and conditions as herein provided for the transfer of power from the lines of the United States over said lines of the licensee, and the requirements of, and the obligations of the licensee under, the provisions of paragraph F herein contained shall be contingent and conditioned upon such reciprocal rights being accorded to licensee, subject to the conditions contained in paragraph F hereof, by any agency of the United States then utilizing the facilities of these lines under the terms of the license.

(C) Paragraph F (8) of the order of October 13, 1949, herein is hereby amended by changing the period of notice required before the licensee may repossess line capacity in use by the United States from thirty months to twenty-four months.

(D) The petition for rehearing filed by the applicant on November 10, 1949, as modified on November 30, 1949, is hereby denied.

(E) The request of the Secretary of the Interior for modification of the standard license provision for the protection of reclamation facilities of the United States is hereby denied.

(F) The complaint filed by the Secretary of the Interior on October 13, 1949, is hereby dismissed.

By the Commission. Commissioner Wallgren not participating.

LEON M. FUQUAY,
Secretary

Date of Issuance: January 18, 1950

[fol. 117]

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. —

FEDERAL POWER COMMISSION, PETITIONER

vs.

IDAHO POWER CO.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner.

It is ordered that the time for filing petition for writ of certiorari

in the above-entitled cause be, and the same is hereby, extended to and including October 6th, 1951.

FRED M. VINSON,
Chief Justice of the United States.

Dated this 2nd day of August, 1951.

[fol. 118]

Supreme Court of the United States

No. 483, October Term, 1951

(Title Omitted)

Order allowing certiorari. Filed March 3, 1952.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Burton took no part in the consideration or decision of this application.

[fol. 119]

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 483

STIPULATION AS TO PRINTING OF RECORD—FILED JULY 17, 1952

Subject to this Court's approval, it is hereby stipulated and agreed by and between counsel for the respective parties to the above-entitled cause that:

For the purpose of hearing and determining the case on the merits, the printed record shall consist of the following:

	Page of original transcript
1. Petition for Review (joint appendix pp. 1-7)	
2. Certificate of Transcript of Record (before Federal Power Commission) (unnumbered in original transcript)	
3. Judgment of United States Court of Appeals for the District of Columbia, dated May 10, 1951, striking paragraph (F) from order of Federal Power Commission	
4. Application for License	3–8
5. Letter, dated September 16, 1947, from J. H. Gutride to Honorable C. A. Robbins	30
[fol. 120]	
6. Identical letters to others	31
7. Notice of Application for Major License	32
8. Amendments to Application for License	36–38
Exhibit J (amended)	50 and 56
Exhibit N (amended)	54
9. Letter, dated December 22, 1947, from FPC to the Secretary of Interior, transmitting application for license and exhibits for report under Section 4(e) and 18 of the Federal Power Act and the provisions of Public Law 732, 79th Congress, 2nd Session, approved August 14, 1946 (entire letter)	69–70

	Page of original transcript
10. Notice of Amended Application for Major License	75
11. Exhibit F (Revised)	82
12. Report, by letter dated February 19, 1948, of the Secretary of Interior, filed February 20, 1948	83–84
13. Order authorizing issuance of license, entered March 2, 1948, and issued March 3, 1948	87–91
14. Letter, dated March 18, 1948, from Leon M. Fuquay to Director, Bureau of Land Management, Department of the Interior	98
15. Application for supplementary amendments to application for license requesting authority to construct, operate and maintain two transmission lines as part of the project, together with exhibits, filed April 20, 1949	110–112
Exhibit J-1	118
Exhibit J-2	119–120
Exhibit M: General Description and Specifications of Equipment	116
Exhibit N: Estimate of Project Cost	117
16. Letter, dated May 2, 1949, from Leon M. Fuquay to Idaho Power Company	143
17. Letter, dated July 29, 1949, from the FPC to the Secretary of the Interior, forwarding application filed April 20, 1949, as amended, and requesting a report pursuant to Section 4(e) of the Federal Power Act	164–165
18. Letter, dated August 10, 1949, from Honorable J. A. Krug, Secretary of the Interior, to Honorable Nelson Lee Smith (entire letter)	166–170
[fol. 121]	
19. Letter, dated August 16, 1949, from FPC to Idaho Power Company, transmitting copy of the report of the Secretary of Interior last above	171
20. Letter, dated August 24, 1949, from J. H. Gutride, Acting Secretary to Director, Bureau of Land Management, Department of Interior	174–178

	Page of original transcript
21. Letter, dated September 9, 1949, from A. C. Inman to Federal Power Commission (entire letter)	179-185
22. Letter, dated September 28, 1949, from FPC to the Secretary of Interior, requesting that conditions relating to transmission lines be submitted by October 3, 1949	215
23. Letter, dated October 4, 1949, from Honorable J. A. Krug, Secretary of the Interior, to Honorable Nelson L. Smith (entire letter)	216–217
24. Letter, dated Oct. 5, 1949, from FPC to Idaho Power Company, transmitting a copy of the report by the Secretary of Interior	221
25. Letter, dated October 5, 1949, from Idaho Power Company, commenting on report of Secretary of Interior, filed October 6, 1949	222–224
26. Order superseding order dated March 2, 1948, authorizing issuance of license, entered and issued October 13, 1949	225–235
27. Letter, dated October 13, 1949, from Honorable J. A. Krug, Secretary of Interior, to Honorable Nelson L. Smith	236
28. Complaint of Department of Interior	237–243
29. Applicant's petition for rehearing, filed November 10, 1949	247–250
30. Letter, dated November 17, 1949, by the Secretary of Interior, relating to provisions of order issued October 13, 1949 (entire letter)	258–259
31. Letter, dated November 28, 1949, from Claude L. Draper, Acting Chairman, to Honorable J. A. Krug, Secretary of Interior	260
[fol. 122]	
32. Modification of petition for rehearing by Idaho Power Company, filed November 30, 1949	261
33. Order extending time for action upon petition for rehearing, entered December 13, 1949, and issued December 14, 1949	273
34. Order modifying order of October 13, 1949, authorizing issuance of license, entered and issued January 18, 1950	275–277

It is further stipulated and agreed that counsel may refer in their briefs and argument to the record on file in this Court, including any part thereof which has not been printed.

It is further agreed that counsel for Respondent in signing this stipulation in no way waives or forfeits its right to discuss or object to the competency, weight or relevance of certain documents and papers which will be printed pursuant to this stipulation.

PHILIP B. PERLMAN
Solicitor General
Counsel for Petitioner

HARRY A. POTH, JR.
Counsel for Respondent

July 17, 1952

U.S. Government Printing Office 1952 218801

LIBRARY
SUPREME COURT, U.S.
No. 12

Office-Supreme Court, U. S.
FILED
DEC 19 1951
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 195

FEDERAL POWER COMMISSION, PETITIONER

v.

IDAHO POWER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statutes and Regulations involved	2
Statement	3
Reasons for granting the writ	3
Conclusion	30
Appendix	31

CITATIONS

Cases:

Addison v. *Holly Hill Co.*, 322 U. S. 607	12, 13
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U. S. 134	12, 13
Federal Power Commission v. *Metropolitan Edison Co.*, 304 U. S. 375	16
Federal Power Commission v. *Pacific Power & Light Co.*, 307 U. S. 156	16
Federal Radio Commission v. *General Electric Co.*, 281 U. S. 464	15
Federal Radio Commission v. *Nelson Bros. Co.*, 289 U. S. 266	15
Federal Trade Commission v. *Morton Salt Co.*, 334 U. S. 37	12, 13, 16
Federal Trade Commission v. *Royal Milling Co.*, 288 U. S. 212	12, 14, 16
Ford Motor Co. v. *National Labor Relations Board*, 305 U. S. 364	12, 16
Pacific Power & Light Co. v. *FPC*, 184 F. 2d 272	7
St. Louis, Brownsville & Mexico Ry. Co. v. *Brownsville Navigation District*, 304 U. S. 295	12
Savannah River Electric Co. v. *FPC*, 164 F. 2d 408	16
Siegel Co. v. *Federal Trade Commission*, 327 U. S. 608	12, 16
Southern Ry. Co. v. *Tift*, 206 U. S. 428	12
Tank Car Corporation v. *El Dorado Terminal Co.*, 308 U. S. 422	12
Texas & Pac. Ry. v. *Abilene Cotton Oil Co.*, 204 U. S. 426	12
United States v. *Idaho Power Co.*, 85 F. Supp. 913	7
United States v. *Interstate Commerce Commission*, 337 U. S. 426	12
United States v. *Jones*, 336 U. S. 641	12

Statutes:

	Page
Act of August 20, 1935, Sec. 1, 49 Stat. 1028, 1038	18
Act of August 20, 1937, 50 Stat. 731, as amended, 16 U. S. C. 832–832e	18
Act of June 5, 1944, 58 Stat. 270, 43 U. S. C. 593a–593b	19
Act of December 22, 1944, sec. 5, 58 Stat. 887, 890	20
Act of March 2, 1945, sec. 2, 59 Stat. 10, 21	19
Act of July 24, 1946, sec. 1, 60 Stat. 634, 637	19
Act of June 30, 1948, 62 Stat. 1171	19
Administrative Procedure Act (60 Stat. 243, 5 U. S. C. 1009):	
Sec. 10	3
Federal Power Act (49 Stat. 847, 16 U. S. C. 791a *et seq.*)	24
Sec. 3 (11)	7, 21
Sec. 4 (e)	10, 21, 29
Sec. 6	10
Sec. 7 (b)	11
Sec. 10 (a)	11
Sec. 10 (g)	11, 23
Sec. 201 (f)	25, 30
Sec. 202 (a)	27
Sec. 202 (b)	25
Sec. 313 (b)	3, 11, 15, 16
Reclamation Law (Act of March 10, 1943, 57 Stat. 14, 16 U. S. C. 835–835i)	19
43 U. S. C. 957 and 959	22, 31
43 U. S. C. 961	32
Miscellaneous:	
Annual Report of Secretary of the Interior for 1950:	
Pp. 49–51	20
P. 112	20
43 C. F. R. 245.9	34
43 C. F. R. 245.11	22
43 C. F. R. 245.21	34
43 C. F. R. 245.21 (v)	22, 34
Department of Interior Order No. 2135, Nov. 21, 1945, 10 F. R. 14527	20
Department of Interior Order No. 2558, March 21, 1950, 15 F. R. 1901	20
Hearings before H. Interstate and Foreign Commerce Committee, 74th Cong., 1st Sess., on H. R. 5423, p. 450	26
Pp. 514–515	27
Report by FPC, September 1, 1948, "Federal Hydroelectric Plants"	20

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 483

FEDERAL POWER COMMISSION, PETITIONER

v.

IDAHO POWER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Federal Power Commission, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on May 10, 1951, and modified on September 21, 1951.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 65)[1] is reported at 189 F. 2d 665.

[1] The abbreviation "R." refers to the printed Joint Appendix; the abbreviation "Tr." refers to the original record which is on file with the Clerk.

JURISDICTION

The judgment of the Court of Appeals was entered on May 10, and modified on September 21, 1951 (R. 73, 76–77). The jurisdiction of this Court is invoked under Section 313 (b) of the Federal Power Act and 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The Idaho Power Company applied to the Federal Power Commission for a license to construct, operate, and maintain a hydroelectric project, including a dam, power plant, and transmission lines, occupying for the most part lands of the United States. An order was granted authorizing issuance of the license on the condition, among others, that the United States have the right at its own expense to interconnect with the project transmission lines and to transfer power over them, at rates of compensation either agreed upon or fixed by the Commission, in such amounts as will not interfere with the Company's use of the lines.

The questions presented are:

1. Whether the Court of Appeals is authorized to strike the condition from the order as unauthorized by law, and to affirm the order as modified without affording the Federal Power Commission, in the exercise of its primary jurisdiction, an opportunity to determine whether the issuance of the license without the condition satisfies the applicable standards of public interest.

2. Whether the Federal Power Commission has authority under Part I of the Federal Power Act to condition the issuance of a license for the construction on and over public lands of a hydroelectric project, including transmission lines, upon the licensee's transmission of Government power over the proposed lines to the extent of their excess capacity.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Federal Power Act (49 Stat. 847, 16 U. S. C. 791a *et. seq.*) may be found in a pamphlet copy of the Act submitted with this petition. Other pertinent statutory provisions and regulations are set forth in the Appendix, *infra*, pp. 31–35.

STATEMENT

The Idaho Power Company filed a petition in the Court of Appeals for the District of Columbia Circuit, under Section 313 (b) of the Federal Power Act (49 Stat. 847, 16 U. S. C. 791a *et seq.*) and under Section 10 of the Administrative Procedure Act (60 Stat. 243, 5 U. S. C. 1009), to review, among other things, the inclusion of certain conditions in two orders of the Federal Power Commission, dated October 13, 1949, and January 18, 1950, authorizing issuance of a license for the construction on lands of the United States of a hydroelectric project (R. 1–7).

The orders authorized issuance of a license under Part I of the Federal Power Act for the

construction, operation, and maintenance, on and along the Snake River, Idaho, of a hydroelectric power project, known as the Bliss development, consisting of a dam, powerhouse, transformers, a switchyard and two transmission lines (R. 44, 46–47).

On August 22, 1947, the Idaho Power Company filed with the Commission, under Section 4 (e) of the Act, its application for a license for the project (R. 12). On March 2, 1948, the Commission authorized issuance of a major license (R. 12–16), but reserved "the right to determine at a later date what transmission facilities should be included in the license as part of the project" (R. 16). On April 20, 1949, after first having sought to obtain a permit for transmission lines in the same area from the Department of the Interior (R. 23), the Company applied for an amendment of its original application to include as part of the project two proposed high-voltage primary transmission lines (R. 17, 66).

One of these lines leads northwesterly from the Bliss Plant to a point near the City of Boise, and the other easterly to a point near the City of American Falls, both in the State of Idaho, at which points the lines join with the Company's interconnected transmission system (R. 42–43). The Boise line, approximately 73 miles long, crosses lands of the United States for a distance of 31.6 miles (R. 43). The American Falls

line, approximately 116 miles long, crosses lands of the United States for a distance of 93.7 miles (R. 43). Thus, the total line length over lands of the United States is approximately 125 miles (R. 43). Of such line mileage crossing lands of the United States, 97.9 miles cross open public lands and 27.4 miles are upon reservations of the United States.

In response to inquiry from the Commission concerning the amended application, the Secretary of the Interior advised the Commission that on July 9, 1948, the Company applied to the Bureau of Land Management of the Department for a permit to construct over public lands a transmission line which was to extend between Boise and American Falls, Idaho (R. 23–24). He also stated that the Department has for some time been concerned with the supply of power in the southern part of Idaho and that the Federal Government had hydoelectric projects in the area, and other federal projects are either under construction or authorized to be constructed (R. 24). Prior to Idaho Power Company's application for a permit to erect the transmission lines over the public lands, the Bureau of Reclamation and the Bonneville Power Administration prepared a report entitled "Report on Availability of Power in Southern Idaho for Development of Phosphate Industry" which proposed

that the United States construct, own, and operate a transmission line connecting the eastern and western parts of the southern Idaho region (R. 24), the same area served by the two proposed transmission lines involved here. This report was transmitted to the Idaho Power Company with a request for a conference to explore the possibility of cooperative arrangements in order to supply power for potential phosphate producers as soon as possible (R. 24).

In negotiations with the Department of the Interior, the Company resisted the suggested condition that the unused capacity of the line over government lands be made available for transmission of government power upon payment of just compensation (R. 24). On April 11, 1949, nine days before the filing of its amended application with the Federal Power Commission (*supra*, p. 4), the Company withdrew its application from the Department of the Interior (R. 24, 17).

The Secretary of the Interior also urged upon the Commission that the proposed transmission lines were intended as main trunk lines, subject to his jurisdiction, and not project lines within the Commission's jurisdiction. (Tr. 167, 216, 242). He stated that the Company originally planned to place the power from the Bliss project on its existing lines at the Hagerman switchyard by means of a relatively short transmission line (Tr. 168), and charged that the application for an amendment to the Company's license was filed not in good faith

but for the purpose of ousting his jurisdiction (Tr. 242).[2]

On October 13, 1949, the Commission entered an order superseding its order of March 2, 1948 (*supra*, p. 4), which reauthorized the license for the Bliss project, including the two proposed transmission lines (R. 41). Among other special conditions, this order contained paragraph (F), as a result of suggestions of the Secretary of the Interior (R. 33–37, 44). This required, as a condition of the license, that the licensee permit the interconnection of transmission facilities of the United States with the two licensed transmission lines, and the transfer over those lines of energy generated in power plants owned by the United States "in such amounts as will not unreasonably interfere with the licensee's use of said lines" (R. 50). The Company is compensated for such transmission of Government power (R. 51).

[2] A "project" is a complete unit of hydroelectric development. See Section 8 (11) of the Federal Power Act. Only primary lines transmitting power from the unit to the distribution system may be considered part of the project. *Ibid.* Transmission lines on and over government lands intended for other purposes would not be within the licensing authority of the Federal Power Commission and would remain subject to the jurisdiction of other governmental agencies. See *Pacific Power & Light Co.* v. *Federal Power Commission*, 184 F. 2d 272 (C. A. D. C.). An earlier suit brought to enjoin construction of the transmission lines involved here did not deal with whether they were "project" lines but only with the initial jurisdiction of the Commission to determine the question upon the filing of a license application. *United States* v. *Idaho Power Co.*, 85 F. Supp. 913 (D. Idaho).

The Commission found, among other things, in accordance with the statutory requirement (Section 10 (a)), that "under present circumstances and conditions and upon the terms herinafter imposed, the project is best adapted to a comprehensive plan for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes" (R. 45).

After the amended license had been authorized with the above condition, the Secretary of the Interior advised the Commission of his understanding that if the Commission was precluded from requiring the condition, the lands involved would be returned to the jurisdiction of the Department so that the terms of its regulations imposing a similar condition might be put into effect (Tr. 259). The Acting Chairman of the Commission replied that he was correct in understanding that the Commission intended to require the condition and that "if the Commission is found to be without jurisdiction the lands will be returned to the Department" (Tr. 260).

The Company's petition for review prayed that the Court of Appeals modify the Commission's order by striking Paragraph (f), remand "the cause to the Commission for further action consistent with the determination of this Court", and grant other appropriate relief (R. 7).

The court below held that Congress had not conferred upon the Commission authority to pre-

scribe the challenged condition. As originally issued on May 10, 1951, the court's opinion directed that Paragraph (F) be eliminated from the Commission's order, and remanded the case to the Commission "for the entry of an order in accordance with this opinion" (R. 74).

The Federal Power Commission thereafter moved for clarification of the judgment, stating that it was not clear "whether the opinion and judgment requires the Commission to enter an order in the exact form of the original order, after eliminating paragraph (F), or whether the Commission is free to reconsider the remainder of the order and to enter such other order as it deems warranted in the exercise of its administrative discretion under the Federal Power Act" (R. 74).

On September 21, 1951, the court modified its earlier opinion by eliminating language relating to remand and substituted the following (R. 76–77):

> The order of the Commission will be modified by the elimination therefrom of paragraph (F), and the order as thus modified will be affirmed. 49 Stat. 860 (1935), 16 U. S. C. A. Sec. 825l (b).

On September 24, 1951, the court recalled the opinion and judgment previously issued to the Federal Power Commission and directed the clerk to issue certified copies of the opinion and judgment as modified by the order of September 21, 1951 (R. 77).

REASONS FOR GRANTING THE WRIT

Two questions of importance are presented by the decision below: (1) The scope of the Court of Appeals' authority to modify orders of the Federal Power Commission without remanding the cause to permit the Commission, in the exercise of its primary jurisdiction, to make the appropriate administrative determination, and (2) the authority of the Federal Power Commission under Part I of the Federal Power Act to require, as a condition to the exploitation of public resources and the use of public lands for the development and transmission of hydroelectric power, that the licensee transmit energy of the United States.

I

The Federal Power Act authorizes the Federal Power Commission to issue licenses for the construction, operation, and maintenance of hydroelectric projects which are "necessary or convenient * * * for the development, transmission, and utilization of power * * * upon any part of the public lands and reservations of the United States." Section 4 (e). Under the statute, "each such license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act and such further conditions, if any, as the Commission shall prescribe" (Section 6), and one of the specific conditions is that the project be such "as in the judgment of

the Commission will be best adapted to a comprehensive plan * * * for the improvement and utilization of water-power development, and for other beneficial public uses." Section 10 (a).

The Commission is further authorized "if necessary in order to secure such plan * * * to require the modification of any project and of the plans and specifications of the project works before approval" (*ibid.*), and to impose, in its discretion, "such other conditions not inconsistent with the provisions of this Act" as it may require. Section 10 (g). Compare Section 7 (b).

Orders of the Commission are reviewable in the courts of appeals which "have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part," but are bound by the Commission's findings of fact "if supported by substantial evidence." Section 313 (b).

The Federal Power Act thus places in the Federal Power Commission initial responsibility to determine whether a proposed hydroelectric project on lands of the United States is best adapted to a comprehensive plan for the improvement and utilization of water power development. In this case, the Commission has determined that the Bliss project will conform with these statutory standards if the Company is required, as part of its license, to carry government power over its project lines. But the Commission has not determined, and it has not had the opportunity to decide, whether the project will fulfill the Act's

commands if this significant condition is eliminated.

By requiring issuance of the license without further proceedings before the Commission and without the condition deemed appropriate by the Commission, the court below has disregarded the principle reiterated in numerous decisions of this Court that, where Congress has reposed primary jurisdiction to make a policy or factual determination in an administrative agency, the courts will stay their hands until the administrative agency endowed with its particular experience has had an opportunity to act.[3]

Several of these decisions present striking analogies to the case at bar. In *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, after sustaining the Commission's order with the exception of two provisions, the Court stated that "since the qualifying clauses constitute an important limitation

[3] *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 55; *Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 612–614; *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 618–619; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 145; *Tank Car Corporation* v. *El Dorado Terminal Co.*, 308 U. S. 422, 432–433; *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364, 373–374; *St. Louis, Brownsville & Mexico Ry. Co.* v. *Brownsville Navigation District*, 304 U. S. 295, 301; *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, 218; *Southern Ry. Co.* v. *Tift*, 206 U. S. 428, 437–438; *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 444, 448; see also *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, 437; *United States* v. *Jones*, 336 U. S. 641, 652–653, 670–671, 672–673.

to the provisos; we think the Commission should have an opportunity to reconsider the entire provisos in light of our rejection of the qualifying clauses, and to refashion these provisos as may be deemed necessary." 334 U. S. at 55.

Similarly, in *Addison* v. *Holly Hill Co.*, 332 U. S. 607, the Court held that the invalid part of a definition committed by Congress to administrative determination could not be excised and the remainder applied. "We can hardly assume that the Administrator would have defined 'area of production' merely by deleting the employee provision, had he known of its invalidity. It would be the sheerest guesswork to believe that elimination of an important factor in the Administrator's equation would have left his equation unaffected even if he did not here insist upon its importance. It is not for us to write a definition. That is the Administrator's duty." 332 U. S. at 618–619. Accordingly, judicial action was stayed to await appropriate administrative action.

In *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, an error of law in the Commission's determination was held not to "foreclose the administrative agency, after its error has been corrected, from enforcing a legislative policy committed to its charge." 309 U. S. at 145. It was "the Commission's responsibility * * * to measure applications by the standards of 'public convenience, interest, or necessity'" (*ibid.*). The determination that the

Commission had misconceived the Pennsylvania law in determining the public interest exhausted the judicial power, and "the Commission was again charged with the duty of judging the application" by the statutory standard (*ibid.*).

And in *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212, where complete suppression by the Federal Trade Commission of misleadingly used trade names was held too drastic, the Court did not attempt to correct the order but stated that "this is a matter which the commission has not considered but which, as the body having primary jurisdiction, it should, in the first instance, consider and determine." 288 U. S. at 218.

Inherent in the decision below is the assumption that the court was authorized to decide, as an original matter and without any prior action by the Commission, that the proposed project, without the important condition, was "best adapted to a comprehensive plan * * * for the improvement and utilization of water-power development, and for other beneficial public uses." This assumption, as shown, is contrary to all modern learning in the field of administrative law. Moreover, the finding implicit in the court's decision was based upon a barren record, since no hearings on this question had been held by the Commission, and the question does not appear to have been presented to the court below (R. 61).

Acquiescence by the Secretary of the Interior in the jurisdiction of the Commission and in the is-

suance of the license resulted from imposition of the condition in question (R. 57–58; Tr. 258). *Supra*, pp. 5–8. By its action, the court below has deprived the Secretary of the Interior of opportunity for a full hearing on his objections before the Commission, and of the possible opportunity for review on an appropriate record of an adverse order by the Commission.

Perhaps an even more fundamental objection to the powers assumed by the court below is that they constitute the exercise of an administrative rather than a judicial function. See *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266. If Congress had intended to establish the Court of Appeals as "a superior and revising agency in the administrative field," then "its decision was not a judicial judgment reviewable" by the Supreme Court. 289 U. S. at 274; *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464. But Congress obviously had no such intention because Section 313 (b) specifically provides that the judgment of the reviewing court shall be "subject to review by the Supreme Court of the United States upon certiorari or certification as provided in * * * the Judicial Code, as amended."[4]

[4] Moreover, the other provisions of Section 313 (b), relating to the conclusiveness of the Commission's findings of fact "if supported by substantial evidence," and to the procedure for taking additional evidence, clearly con-

The statutory provision authorizing the court "to affirm, modify, or set aside such order in whole or in part" (Sec. 313 (b)), does not permit judicial action without a primary determination by the Commission of the matter in issue. This language is similar to that authorizing judicial modification of the administrative order in *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364, where the "familiar appellate practice" of remanding causes to the administrative agencies for appropriate action is described (305 U. S. 373–374), and in *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212; *Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608; and *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37 (all cited in fn. 3, *supra*, p. 12), where judicial disagreement with administrative action resulted in remand rather than exercise by the courts, in the first instance, of the agency function.[5]

It is clear, then, that the proper procedure was to remand the cause to the Commission for

---

template the traditional relationship between the administrative agency and the reviewing court.

[5] This Court has affirmatively indicated that it regards judicial review under the Federal Power Act as essentially the same as the traditional limited review of administrative action. *Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 612, note 3; *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156; *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375; see also, *Savannah River Electric Co.* v. *Federal Power Commission*, 164 F.

further proceedings consistent with the court's opinion. This would permit the primary determination by the Commission of compliance with the statutory standards, in the absence of the prescribed condition.[6] Its new findings would, of course, be conclusive if supported by substantial evidence on the record as a whole. In precluding the exercise of such administrative judgment by eliminating a condition found appropriate by the Commission to satisfy the statutory standard of public interest, and by making the order effective without the condition, the court below plainly contravened established standards of judicial review.

II

Review of the holding that the Federal Power Commission has no authority to require transmission over licensed lines of government power as a condition to a license to use public lands for private transmission lines is important because (a) there has been a large increase in the con-

[6] The Commission's finding on the original application, that the statutory standard had been satisfied without the condition here in question, did not relate to the transmission lines which were not described in that application. The condition was later imposed because of the amended application for a license to construct transmission lines, which are an important part of the project (R. 21). *Supra*, pp. 4, 7. The prior findings, therefore, are not relevant to this aspect of the project. The adequacy of the Commission's finding, as a factual matter, that the condition to the license for the transmission lines was necessary to satisfy the statutory

struction of federal power projects since 1935, and the ruling below will, therefore, have a wide impact, (b) the regulations of the Department of the Interior in a closely related field require such carrying of federal power, and (c) the court's interpretation of the Commission's authority under Part I of the Federal Power Act is erroneous

(a). The Court of Appeals' decision entirely forecloses the Commission from taking account of the need for wheeling arrangements in the public power program, a problem which the activities of the Federal Government in the development of hydroelectric power in recent years have made one of great magnitude.[7]

The construction of power plants by the United States was more or less limited until the past decade. Plants were not usually located so as to require more than a few transmission lines, and interconnections with non-Federal power systems could be achieved in the few instances where desirable without resort to wheeling arrangements. In 1935, Congress authorized construction of the Bonneville Dam by the Army Corps of Engineers (Act of Aug. 20, 1935, Sec. 1, 49 Stat. 1028, 1038) and in the same Act authorized the President, through his designated

[7] Wheeling arrangements are arrangements for the transmission of another's electric power over one's lines. The recent development of the public power program explains the absence of conditions for wheeling in earlier licenses granted by the Commission.

agent, to construct, operate, and maintain the Grand Coulee Project (49 Stat. 1040).

With the impending completion of the Bonneville Dam, Congress in 1937 authorized a temporary form of administration, pending establishment of a permanent administration embracing other Columbia Basin projects (Act of Aug. 20, 1937, 50 Stat. 731, as amended, 16 U. S. C. 832–832e). In 1943, Grand Coulee was reauthorized as the Columbia Basin Project, subject to specified provisions of the Reclamation Law (Act of March 10, 1943, 57 Stat. 14, 16 U. S. C. 835–835l). Subsequently, the Bonneville Power Administrator's marketing responsibilities were extended to various other projects (Acts of June 30, 1948, 62 Stat. 1171; June 5, 1944, 58 Stat. 270, 43 U. S. C. 593a–593b; Act of March 2, 1945, sec. 2, 59 Stat. 10, 21; Act of July 24, 1946, sec. 1, 60 Stat. 634, 637). A number of other projects are proposed for the Columbia River basin to relieve the severe power shortage in that area.

The Commission has recently licensed projects now under construction in the Pacific Northwest, which will be coordinated in operation with the Federal projects in the area, and several more applications for non-Federal development are now pending for projects in that region. Interconnections with these plants and others being proposed for licensing are now being seriously considered by the Bonneville Power Administration, the Commission, and the prospective applicants.

In addition to marketing power from a number of projects constructed under the Reclamation Act, the Secretary of the Interior acts as marketing agent for power generated at dams constructed by the Secretary of the Army (Act of December 22, 1944, sec. 5, 58 Stat. 887, 890). For the latter purpose, the Secretary of the Interior has created the Southwestern Power Administration to operate in the States of Arkansas, Louisiana, parts of Kansas, Missouri, Oklahoma, and Texas (Dept. of Int. Order No. 2135, Nov. 21, 1945, 10 F. R. 14527). For a like purpose, he has created the Southeastern Power Administration to operate in the States of West Virginia, Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Tennessee and Kentucky (Dept. of Int. Order No. 2558, March 21, 1950, 15 F. R. 1901).

In his Annual Report for 1950, p. 112, the Secretary of the Interior reports that in the fiscal year 1950 he disposed of 24,100,000,000 kilowatt hours of energy at a total revenue of over $59,800,000. The ultimate capacity involved in the projects constructed, under construction, and authorized to be constructed by the Bureau of Reclamation will have a total of approximately 5,950,000 kilowatts (*Ibid.*, pp. 49–51). Of the plants authorized by Congress since 1935 for Federal construction, eight are in operation, with a total capacity of 970,400 kilowatts, 23 plants are under construction with a total capacity of

3,680,175 kilowatts, and funds have been authorized for the construction of 40 more plants with a total capacity of 7,983,600 kilowatts (Report by F. P. C., Sept. 1, 1948, "Federal Hydroelectric Plants").

Wheeling arrangements, similar to the conditions imposed by the Commission in this case, can result in considerable economies to the United States in the construction of transmission and substation facilities whenever a utility system, either privately or municipally owned, can be utilized to transmit power to customers of the United States or to agencies of the United States. Such arrangements, which avoid duplication of facilities, are also plainly essential to the development of a comprehensive plan for the power resources of the area. It is impossible to estimate accurately the number of situations in which such arrangements will be desirable, but Federal transmission networks are being constructed in the Pacific Northwest, in California, in the Missouri River Valley, in the Southwest, and in the Southeast, thereby expanding opportunities for economic interconnections of this character.

(b). Although the Federal Power Commission is authorized to license "project works"[8] upon the public lands and reservations of the United States (Section 4 (e)), the Secretary of the Interior has general authority, "under general regulations

[8] "Project" is defined in Section 3 (11). See also fn. 2, *supra*, p. 7.

to be fixed by him," to permit the use of the public lands, national forests, and other reservations for electrical plants and transmission lines. 43 U. S. C. 957 and 959, *infra*, pp. 31–32. Pursuant to these statutory provisions, the Secretary has promulgated regulations requiring applicants for the use of public land for these purposes to interconnect with federal lines and transmit government power.

These regulations provide that power permits will be granted only where it appears that the proposed development "will be in general accord with the most beneficial utilization of the resources there involved and consistent with the public interest." 43 C. F. R. 245.11. They require applicants to file a stipulation expressly agreeing to accept a power permit subject to the condition that they will permit the Government "to interconnect its transmission facilities with the transmission line of which the line for which the permit is requested forms a part," and to construct the line to make it available to the Government "for the transmission of electric power and energy in such manner and for such amounts as will not unreasonably interfere with the permittee's use of the line." 43 C. F. R. 245.21 (v), *infra*, pp. 34–35.

If the decision below remains standing, the use of public lands for private transmission lines may be conditioned upon the transmission of government power, so long as "project" lines under the

Federal Power Act are not involved, since the decision of the court below is based upon the particular provisions of that Act. The capriciousness of this situation is illustrated in the instant case where the Company first applied to the Department of the Interior for a permit to construct the lines in question and, upon learning of the condition of interconnection, withdrew its application and filed an application with the Federal Power Commission for a license to construct virtually the same transmission lines as part of the project. *Supra*, pp. 5–8. Since power companies, by their own action, may thus bring themselves within the "project" jurisdiction of the Commission, it may be expected that applicants will attempt to take advantage of the difference in agency powers.

(c). In view of the foregoing, the problem of statutory interpretation assumes a special importance which is heightened by the error in the Court of Appeals' ruling. The court recognized the plenary power of Congress over the public lands and its authority to impose conditions without limitation, but held that the authority sought to be exercised by the Federal Power Commission had not been conferred by Congress. This decision was based on the ground that Part II of the Federal Power Act prohibits the Federal Power Commission from requiring interconnection of government lines with private lines, and that Section 10 (g) in Part I of the Federal

Power Act, upon which the Commission in part relied for authority to impose the condition herein, requires all license conditions to be "not inconsistent with the provisions of this Act." The court reasoned that since interconnection cannot be required under Part II, a condition under Part I requiring such interconnection is inconsistent with Part II of the statute.

Despite its superficial plausibility, the fallacy of this reasoning is laid bare by an examination of the history of the present Federal Power Act. The Act embodies three major enactments. The original statute of June 10, 1920, created the Federal Power Commission and established complete machinery for licensing the construction, operation, and maintenance of water power projects. The Act of June 23, 1930, reorganized the Federal Power Commission, substituting an independent agency for the former commission consisting of the Secretaries of the Departments of War, Interior, and Agriculture. The Act of August 26, 1935, provided a scheme for regulation of public utility holding companies by the Securities and Exchange Commission in Title I and amendments and additions to the Federal Water Power Act in Title II.

Title II was itself divided into three parts, relating (i) to amendments to the existing Federal Water Power Act, (ii) to regulation of public utility companies engaged in interstate commerce, and (iii) to both "licenses and public

utilities; procedural and administrative provisions." This title gives the original Water Power Act, as amended, the heading "Part I," and numbers the two new parts as Part II and Part III.

Part I relates exclusively to provisions for the improvement of navigation, the development of water power, and the use of public lands in relation thereto, and the Commission acts through the issuance of licenses to make use of Federal water power and public lands. Before enactment of the 1935 Act there was no express limitation upon the imposition of the requirement involved here as a condition to a license to use public lands.[9]

Part II, added by the 1935 Act, relates exclusively to the regulation of utility companies engaged in the interstate transmission and sale of electric energy. In one aspect of this regulation, the Commission is given power to establish power supply regions and to require interstate utility companies to interconnect and coordinate their transmission and generating facilities. Section 202 (b). Municipalities, states, and the United States are explicitly excluded from the scope of Part II. Section 201 (f).

The court below has held that the Commission lost its authority under Part I to require a pri-

[9] Nor did any of the specific amendments to the Water Power Act, included in Part I of Title II of the 1935 Act, limit or prohibit the imposition of the condition.

vate power company, as a condition to exploiting public resources and using public lands to transmit government power, because authority to require interconnection with existing lines not over government lands was not conferred by Part II. Reliance is placed solely on some testimony of Mr. Dozier De Vane, then Solicitor of the Federal Power Commission, before a congressional committee (R. 70). But Mr. De Vane's prior general explanation of the structure of Title II of the 1935 Act makes clear that Part II was not intended to amend, in any way the licensing provisions of the Water Power Act included in Part I.[10] And Mr. De Vane's specific discussion of interconnec-

[10] (While under discussion before the committees of Congress, what are now referred to as Parts I, II, and III of the Federal Power Act were referred to as Title I, Title II, and Title III, of Title II, respectively.)

Mr. De Vane's testimony is as follows (Hearings before H. Interstate and Foreign Commerce Committee, 74th Cong., 1st Sess., on H. R. 5423, p. 459):

"Mr. MAPES. Until we get down to Title II of Title II of the bill, the provisions in this bill in Title II, that is in Title I of II, are amendments to the present Federal Water Power Act?

Mr. DE VANE. That is correct, sir.

Mr. MAPES. And, Title II and Title III of Title II, are they entirely new matters?

Mr. DE VANE. Entirely new matters.

Mr. MAPES. And you are not proposing to amend the licensing section or provisions of the Water Power Act?

Mr. DE VANE. The new matter makes no amendments to the licensing sections of the Water Power Act. In Title III of the present Act have been brought forward some of the provisions that are purely administrative in character that now appear in the Federal Water Power Act, and as I read those provisions I will explain how they are handled."

tion shows that he was not concerned with the Commission's licensing power under Part I, but only with the new regulatory powers conferred by Part II and the Commission's authority to require interconnection of transmission lines under Section 202 (a) of Part II."

All discussion of "this bill" and the nature of the regulation is consistent only with the pro-

---

[11] Hearings before H. Interstate and Foreign Commerce Committee, 74th Cong., 1st sess., on H. R. 5423, pp. 514–515:

"Mr. WOLVERTON. Under the provisions of this bill, would it be possible for the Government in any of its electric operations to utilize the transmission lines of private companies?

Mr. DE VANE. No, sir; and I want to make that very definite; and if there is any doubt about it, so far as I am concerned, such amendment might be made as to make it clear. We have attempted in this bill, Mr. Wolverton, to accomplish these two purposes: One is not to supersede, but aid State regulation; and insofar as rates are concerned, to deal only with rates that State Commissions cannot regulate.

We have, insofar as State, municipal, or Government projects are concerned, excluded them from the jurisdiction of the Commission or from coming under this act. We have been earnest and honest in our effort to accomplish this result. We think we have done it. If we have not and it is the desire of Congress not to bring Government projects under the jurisdiction of the Commission, or give the municipal or governmental projects the right to use the transmission lines of private industry—and we have [illegible]ceeded in making that clear in this bill—an amendment should be proposed that will do it better. It will receive our hearty endorsement.

Mr. WOLVERTON. Let me suggest a possible situation. Your answer will clarify my mind considerably as to the effect of this bill in the particular instance; Assume that a municipality built a plant for the generation and distribution of electric energy; assume that a distant community is serviced by a company that comes under the regulation of this bill in that it procures its electric energy from outside of the State. Could the city which has constructed a plant, but has no

visions of Part II. Mr. De Vane's definition (footnote 10) of the two purposes of the bill to "aid State regulation" and "to deal only with rates that State Commissions cannot regulate," applies exclusively to regulation of interstate utilities and has no application to licensing powers of water projects. His testimony (footnote 11) that the act

---

transmission lines, utilize the system of transmission lines constructed by the private company?

Mr. DE VANE. No, sir.

Mr. WOLVERTON. Then, you do not think that the power given in this bill to the Federal Power Commission would enable it to direct that those transmission lines be so used?

Mr. DE VANE. Mr. Wolverton, my answer to that is this: That if there is any doubt about it and this committee can remove that doubt by additional words in this bill, let us put them in.

Mr. WOLVERTON. I do not think that anybody could be more anxious to be fair.

Yesterday you suggested an amendment with respect to rates that cleared up a situation which was not clear until you offered the amendment; and your willingness to suggest an amendment of that kind, if the committee deems it necessary, indicates your sincere effort to have no doubt as to the meaning of the language used.

Mr. DE VANE. I am sincere in all I say to you in connection with that matter. We are not attempting to get control in any manner of municipal, State, or Federal projects, or the energy produced by those projects. That is the Commission's position. The chairman of the Commission just stated to me that I could announce that is the Commission's position in this matter.

Mr. WOLVERTON. May I ask, did you participate in the drawing of this bill?

Mr. DE VANE. Of Title II of Title II.

Mr. WOLVERTON. Yes.

Mr. DE VANE. Yes, sir; I participated in it, in making suggestions. I worked on it some; yes, sir."

excludes state, municipal, and Government projects from jurisdiction of the Commission, can only refer to Part II because, as the Solicitor of the Commission, he knew that state and municipal projects had been explicitly made subject to the licensing jurisdiction of the Commission in Part I since 1920. Surely, this answer did not nullify the provisions of Section 4 (e), requiring states and municipalities to obtain licenses from the Commission for the construction of hydroelectric projects. Moreover, Mr. Wolverton's question about "a company that comes under the regulation of this bill in that it procures its electric energy from outside of the State," is pertinent only to jurisdiction under Part II which is based on interstate transmission of energy, and has no application to jurisdiction over licensees for water power projects under Part I. Finally, any possible doubt concerning references to "this bill", throughout the discussion, is entirely removed when Mr. De Vane, in response to Mr. Wolverton's question if he helped "draw up this bill," asked specifically whether Mr. Wolverton was referring to Title II (now Part II) of Title II, and Mr. Wolverton replied, "Yes."

Part II of the Federal Power Act marked a new venture of the Government in the regulation of public utilities, based upon the interstate transmission of electric energy, and constituted a complete departure from the previous system founded on the licensing of the construction and

operation of hydroelectric projects in connection with the use of navigable streams or public lands. Mr. De Vane's testimony did no more than explain that it was not the purpose of the new legislation creating additional regulatory powers to authorize the Commission to require interconnection of private public utility facilities with government lines. To make this clear, Section 201 (f) was added to Part II, providing that nothing "in this Part" was applicable to the United States or other government agencies.

But failure to create authority under Part II to require interconnection in the regulation of the interstate transmission of power by private companies, does not amount to a limitation of pre-existing authority in the licensing of private persons to use public lands and federal water power.[12] The language of Part II is only that certain new powers are created and these new powers do not extend to government lines The decision below would convert the limited grant of additional power into the repeal of authority previously enjoyed.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

DECEMBER 1951.

[12] In fact, only by coincidence will the same persons fall under the purview of both parts of the Act.

APPENDIX

43 U. S. C. 957, 959, 961 provide as follows:

§ 957. Right-of-way to electric-power companies.

The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and national forests of the United States by any citizen or association of citizens of the United States for the purposes of generating, manufacturing, or distributing electric power.

§ 959. Rights-of-way for electrical plants, etc.

The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest, and other reservations of the United States, and the Yosemite and Sequoia National Parks, and the General Grant grove section of the Kings Canyon National Park, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic,

public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided,* That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further,* That all permits given hereunder for telegraph and telephone purposes shall be subject to the provisions of sections 1–6 and 8 of Title 47, regulating rights of way for telegraph companies over the public domain: *And provided further,* That any permission given by the Secretary of the Interior under the provisions of this section may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

§ 961. Rights-of-way for electrical poles and lines.

The head of the department having jurisdiction over the public lands is authorized and empowered, under general regu-

lations to be fixed by him, to grant an easement for rights of way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands, national forests, and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for telephone and telegraph purposes, to the extent of twenty feet on each side of the center line of such electrical, telephone, and telegraph lines and poles, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right of way herein granted for any one or more of the purposes herein named: *Provided,* That such right of way shall be allowed within or through any national park, national forest, military, Indian, or other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: *Provided,* That all or any part of such right of way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for nonuse for a period of two years or for abandonment.

Any citizen, association, or corporation of the United States to whom there was issued, prior to March 4, 1911, a permit for any of the purposes specified herein under any existing law may obtain the benefit of this section upon the same terms and conditions as shall be required of citizens, associations, or corporations thereafter making application under the provisions of this section.

43 C. F. R. 245.9 provides as follows:

§ 245.9 *Filing of application.*—(a) All applications for occupancy or use of Interior Department lands, except Indian lands, for power purposes should be submitted in duplicate on Form 1, which is made a part hereof, and filed at the district land office of the land district in which the lands are situated. If the lands are situated in more than one district, the lands in both districts shall be embraced in one set of application papers, which shall be submitted in any one of such districts at the option of the applicant, who shall submit to the district land office in each other district a print copy of the maps submitted to the district land office of the first district. If there is no district land office, the application should be filed with the Director of the Bureau of Land Management, Washington, D. C. (See also, § 245.27.)

43 C. F. R. 245.21 provides as follows:

§ 245.21 *Stipulation required as a condition precedent to the approval of permit.*—The applicant shall file with the application required under § 245.9, a duly executed stipulation expressly agreeing to accept the power permit subject to the following terms and conditions, excepting those which the regional administrator, after clearance with the Division of Power, or such power agency as it may designate for the area involved, may waive in a particular case, to wit:

* * * * * *

(v) Upon such terms and conditions and in such manner as the regional administrator may direct, to permit the Government or any agency or instrumentality thereof,

hereinafter referred to as the Government, to interconnect its transmission facilities with the transmission line of which the line for which a permit is requested forms a part; to construct, operate, and maintain such line and all related facilities, wherever situated, in such manner and condition as to make available to the Government the effective use of such line for the transmission of electric power and energy in such manner and for such amounts as will not unreasonably interfere with the permittee's use of the line; and to permit the Government to so use the line in accordance with the terms and conditions agreed upon by the regional administrator and the permittee, including the terms upon which the Government will pay its proportionate share of the monthly cost of the lines.

U.S. GOVERNMENT PRINTING OFFICE: 1982

LIBRARY
SUPREME COURT, U.S.

No. 12

Office - Supreme Court, U. S.
FILED
FEB 28 1952
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1951

FEDERAL POWER COMMISSION, *Petitioner*,

v.

IDAHO POWER COMPANY.

On Petition for a Writ of Certiorari to the Court of Claims

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 483

FEDERAL POWER COMMISSION, *Petitioner,*

v.

IDAHO POWER COMPANY.

On Petition for a Writ of Certiorari to the Court of Claims

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

---

1. Respondent's brief in opposition contends that the petition was not filed within the statutory time on the theory that the judgment of May 10, 1951 (R. 73), fixed the filing date. The May 10th judgment was modified on September 21, 1951 (R. 76-77), and was recalled on September 24, 1951 (R. 77). The petition was filed within 90 days of September 21, 1951. Since the substance of the earlier judgment was modified and the judgment itself recalled, it is submitted that the

time for filing the petition runs from the date of the order of modification and not from the date of the order modified.

Where a judgment has been modified to correct other than clerical or formal errors, the time for appeal runs from the date of the modification and not the original judgment. *Zimmern* v. *United States,* 298 U. S. 167; *United States* v. *Gomez,* 1 Wall, 690, 700. In fact, consideration on its merits of an untimely petition for rehearing, suspends the time for appeal until it has been acted upon, even without modification of the order or judgment. *Bowman* v. *Loperena,* 311 U. S. 262, 266; cf. *Pfister* v. *Finance Corp.,* 317 U. S. 144, 149-150.

It cannot be seriously urged that the substance of the May 10th judgment was not modified or that petitioner's motion for clarification was not entertained.[1] The original judgment directed that the Commission's order "be modified, and that this cause be, and it is hereby, remanded to the Federal Power Commission for the entry of an order in accordance with the opinion of this Court"

[1] Denoting the motion as one for clarification rather than rehearing is without significance. The effect of the modification of a judgment is the same without any motion at all (*Zimmern* v. *United States,* 298 U. S. 167), and a motion to amend findings has been given the same effect as a motion to amend the judgment since it "was not addressed to mere matters of form but raised questions of substance since it sought reconsideration of certain basic findings of fact and the alteration of the conclusions of the court." *Leishman* v. *Associated Electric Co.,* 318 U. S. 203, 205.

(R. 73). The Court's order of September 21, however, directed "that the judgment and decree entered in this cause on May 10, 1951, be, and it is hereby, amended to read" that the Commission's order "be, and it is hereby, modified by striking therefrom paragraph (F) thereof, and that the order of the Federal Power Commission herein as thus modified be, and it is hereby, affirmed" (R. 76-77).

The effect of the modified judgment was to direct the issuance of the license without the contested paragraph, whereas the language of the original judgment appeared to leave to the Commission's discretion the issuance of the license on such other conditions as it deemed appropriate, or not at all, so long as it did not require the company to interconnect its transmission facilities with Government lines.

The fact that the Commission's motion, although filed out of time, was entertained is established by the order of modification, which recites that it was done "on consideration of respondent's motion for clarification of the opinion and judgment of this Court" (R. 76) and by the recall of the certified copies of the original opinion and judgment (R. 77).[2] Under the governing authorities,

[2] Failure of the court to direct a change in the date of the original order is of no consequence, since even the issuance of a *nunc pro tunc* order does not vitiate the effectiveness of the date of actual modification. *United States* v. *Gomez*, 1 Wall. 690, 700.

therefore, the judgment based upon the motion for clarification must be considered the final judgment for purposes of review.[3]

2. Respondent asserts that the Commission had previously approved its project, and, accordingly, that no question is presented as to the Commission's primary jurisdiction to make the necessary statutory findings. But the Commission's prior findings and order of approval related to the dam and power plant, not to the transmission lines involved in this case (R. 12). The Commission's order stated specifically (R. 16):

> (g) The Commission reserves the right to determine at a later date what transmission facilities should be included in the license as part of the project.

This provision in the order was doubtless prompted by respondent's general reference to "transmission lines" in its application for a license. There was no specific mention of the lines presently involved, almost 200 miles in length and crossing Government lands for approximately 125 miles, until a year later, after the unsuccessful effort to obtain a permit from the Department of the Interior.

---

[3] A fuller discussion of the authorities on this question is contained in the Government's reply to respondent's brief in opposition filed earlier this month in *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Company*, No. 479, this Term.

Moreover, it is clear that the Commission did not believe that its determination made with respect to the original license application controlled with respect to the amended application for these transmission lines. The motion for clarification filed in the court below by the Federal Power Commission over the signature of its general counsel stated (R. 74):

> The determination of whether a license should issue without paragraph (F), or what license conditions, if any, may be otherwise appropriate, is a determination for which the Commission has been given primary responsibility and the responsibilities of the Commission under the Federal Power Act should not be predetermined by this Court.

Respectfully submitted,

PHILIP B. PERLMAN,

Solicitor General.

FEBRUARY, 1952.

☆ U.S. GOVERNMENT PRINTING OFFICE 1952—990803/P.O. 818

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
OCT - 7 1952
CHARLES ELMORE CROPLEY
CLERK

No. 12

In the Supreme Court of the United States

OCTOBER TERM, 1952

FEDERAL POWER COMMISSION, PETITIONER

v.

IDAHO POWER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	3
Statement	3
Introduction and summary of argument	15
Argument:	
I. Even if the conditions which the Commission attached to its order were unlawful, the Court of Appeals erroneously exercised an administrative function, beyond the proper limits of judicial review of administrative action, in modifying the license by eliminating the conditions	18
A. An exercise of the Commission's judgment is required by statute	18
B. This judgment cannot be exercised by the reviewing court	21
C. A remand is required unless the agency clearly manifests its intention to permit the modified order to stand	27
II. The Commission is authorized under the Act to condition a license to exploit public resources upon the licensee's transmission of Government power	31
A. Statutory language and background	33
B. Legislative history of the 1935 Act	39
C. The decision below is inconsistent with general provisions in the Act relating to licenses	46
D. The decision below is inconsistent with federal power policy	50
Conclusion	56
Appendix	57

CITATIONS

Cases:	
Addison v. *Holly Hill Co.*, 322 U. S. 607	23, 24
Alberty v. *Federal Trade Commission*, 182 F. 2d 36	28
Belmont Laboratories v. *Federal Trade Commission*, 103 F. 2d 538	28
Connecticut Light & Power Co. v. *Federal Power Commission*, 324 U. S. 515	26

224291—52——1

Cases—Continued

	Page
Educators Ass'n v. *Federal Trade Commission*, 108 F. 2d 470, modified, 118 F. 2d 562	28
Far East Conference v. *United States*, 342 U. S. 570	22
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U. S. 134	23, 27
Federal Power Commission v. *Metropolitan Edison Co.*, 314 U. S. 375	26
Federal Power Commission v. *Pacific Power & Light Co.*, 307 U. S. 156	26
Federal Radio Commission v. *General Electric Co.*, 281 U. S. 464	27
Federal Radio Commission v. *Nelson Bros. Co.*, 289 U. S. 266	26
Federal Trade Commission v. *Morton Salt Co.*, 334 U. S. 37	23, 24, 26
Federal Trade Commission v. *Royal Milling Co.*, 288 U. S. 212	23, 25
Florida v. *United States*, 282 U. S. 194	20
Ford Motor Co. v. *National Labor Relations Board*, 305 U. S. 364	23, 25
Gimbel Bros. v. *Federal Trade Commission*, 116 F. 2d 578	28
Hamilton v. *Regents of University of California*, 293 U. S. 245	32
Idaho Power Co. v. *Chapman*, decided June 2, 1952	55
Mahler v. *Eby*, 264 U. S. 32	20
National Labor Relations Board v. *United States Truck Co.*, 124 F. 2d 887	28
Pacific Power and Light Co. v. *Federal Power Commission*, 184 F. 2d 272	7
Panama Refining Co. v. *Ryan*, 293 U. S. 388	20
Pennsylvania Water & Power Co. v. *Federal Power Commission*, 343 U. S. 414	45
Railroad Retirement Board v. *Alton R. Co.*, 295 U. S. 330	27
Reconstruction Finance Corporation v. *Bankers Trust Co.*, 318 U. S. 163	25
Tank Car Corporation v. *El Dorado Terminal Co.*, 308 U. S. 422	22
Texas & Pac. Ry. Co. v. *Abilene Cotton Oil Co.*, 204 U. S. 426	22
St. Louis, Brownsville & Mexico Ry. Co. v. *Brownsville Navigation District*, 304 U. S. 295	22
Savannah River Electric Co. v. *Federal Power Commission*, 164 F. 2d 408	26
Siegel Co. v. *Federal Trade Commission*, 327 U. S. 608	23, 25, 26
Sinclair v. *United States*, 279 U. S. 263	32
Southern Ry. Co. v. *Tift*, 206 U. S. 428	22
United States v. *Baltimore & Ohio Railroad Company*, 284 U. S. 195	25

Cases—Continued Page

United States v. *Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311 ..... 21, 28
United States v. *City and County of San Francisco*, 310 U. S. 16 32
United States v. *Idaho Power Company*, 85 F. Supp. 913 7
United States v. *Interstate Commerce Commission*, 337 U. S. 426 22
United States v. *Jones*, 336 U. S. 641 22
United States v. *Lowden*, 308 U. S. 225 20
Wichita R. R. v. *Public Utilities Commission*, 260 U. S. 48 20

Statutes:
Act of June 23, 1930, 46 Stat. 797 33
Administrative Procedure Act (60 Stat. 243, 5 U. S. C. 1009):
Section 10 3
Bonneville Project Act, 50 Stat. 731 51
Boulder Canyon Project Act, 45 Stat. 1057 50
Emergency Relief Act of 1935, 49 Stat. 115 50
Federal Power Act (49 Stat. 847, 16 U. S. C. 791a *et seq.*) 18, 33
Section 3 (4) 45
Section 3 (11) 7, 54
Section 4 (e) 7, 18, 43, 47, 48, 54
Section 4 (g) 35, 47, 48
Section 6 ..... 19, 34, 38, 49
Section 7 (a) 44, 48, 49
Section 7 (b) 48, 49
Section 10 (a) 16, 19, 35, 36, 46, 47
Section 10 (e) 49
Section 10 (g) 16, 19, 32, 35, 38, 39
Section 11 (a) 49
Section 14 49
Section 18 49
Section 201 (f) 17, 18, 37, 38, 39, 45
Section 202 (a) 35, 36, 37
Section 202 (b) 17, 36, 37, 41, 45
Section 313 (b) 3, 19, 25, 27
Federal Water Power Act of June 10, 1920, 41 Stat. 1063 ..... 18, 33, 34
Flood Control Act of 1936, 49 Stat. 1570 51
Fort Peck Act of 1938, 52 Stat. 403 51
National Industrial Recovery Act, 48 Stat. 195 50
Public Law 136, 82d Cong., 1st sess., p. 8 53
Public Law 470, 82d Cong., 2d sess., pp. 1, 7 53
Public Utility Act of August 26, 1935, 49 Stat. 838 33
Reclamation Project Act of 1939, 53 Stat. 1187 51
Rural Electrification Act, 49 Stat. 1363 51
Tennessee Valley Authority Act, 48 Stat. 58 50
43 U. S. C. 957 ..... 7, 54, 57

Statutes—Continued Page
43 U. S. C. 959 ..... 7, 54, 57
43 U. S. C. 961 ..... 7, 54, 57
Miscellaneous:
Annual Report of the Secretary of the Interior (1951):
pp. XX–XXIII 52
p. 56 52
pp. 58–59 52
p. 123 51
pp. 136–139 ..... 8, 52
p. 143 8
p. 152 52
pp. 153–154 52
43 C. F. R. 244.14, 17 Fed. Reg. 5899 ..... 54, 60
43 C. F. R. 244.44, 17 Fed. Reg. 5903 61
43 C. F. R. 244.44 (d), 17 Fed. Reg. 5903 ..... 54, 62
95 Cong. Rec. 14116–14117 53
96 Cong. Rec. 10497 53
97 Cong. Rec., 7785, 7786, 7787, 7796, 7847–7848 53
98 Cong. Rec. (unbound ed.) 3008, 9302, 9321, 9543 53
Hearings before H. Interstate and Foreign Commerce Committee, 74th Cong., 1st sess., on H. R. 5423, pp. 514–515 41
Hearings before H. Interstate and Foreign Commerce Committee, 74th Cong., 1st sess., on H. R. 5423, p. 459 41
H. Rep. 339, 82d Cong., 1st sess., pp. 2–3, 11 53
H. Rep. 888, 82d Cong., 1st sess., p. 5 53
H. Rep. 1628, 82d Cong., 2d sess., p. 2 53
S. Rep. 499, 82d Cong., 1st sess., pp. 4, 5, 7, 23 53
S. Rep. No. 521, 74th Cong., 1st sess., p. 19 ..... 38, 45
S. Rep. 661, 81st Cong., 1st sess., pp. 4, 13, 14 53
S. Rep. 1803, 82d Cong., 2d sess., p. 2 53
S. Rep. 1941, 81st Cong., 2d sess., pp. 125, 145, 150 53
Report of President's Water Resources Policy Commission, Vol. 1, pp. 221–225 ..... 51, 52

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 12

FEDERAL POWER COMMISSION, PETITIONER

v.

IDAHO POWER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 6–13) is reported at 189 F. 2d 665.

JURISDICTION

The original judgment of the Court of Appeals was entered on May 10, 1951 (R. 14), and was modified on September 21, 1951 (R. 16–18). The petition for certiorari was filed on December 19, 1951, and was granted on March 3, 1952 (R. 129). The jurisdiction of this Court rests upon Section 313 (b) of the Federal Power Act and 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

The Idaho Power Company applied to the Federal Power Commission for a license to construct, operate, and maintain a hydroelectric project, including a dam, power plant, and transmission lines, which would occupy for the most part lands of the United States. The Commission granted the license, but only on certain conditions, principally that the United States should have the right at its own expense to interconnect with the project transmission lines for the transmission of Government power to the extent of the capacity available in excess of the Company's needs, with full compensation to the Company by the United States for transmitting such Government power. The Company, in its petition for review, asserted that the Commission could not lawfully attach these conditions to its order, and the Court of Appeals agreed.

The questions presented are:

1. Whether the Court of Appeals exceeded the appropriate limits of judicial review in striking the conditions from the license and in affirming the order as thus modified, without remanding the case to the Commission in order to afford the latter an opportunity, specifically requested by it in a petition to the court, to determine whether issuance of the license without the stricken conditions would satisfy the applicable standards of public interest.

2. Whether the Court of Appeals erred in construing the Federal Power Act as denying the Commission authority to condition the issuance of a license for the construction on and over public lands of a hydroelectric project, including transmission lines, upon the licensee's transmission of Government power over the proposed lines to the extent of their excess capacity, with full compensation to the licensee.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Federal Power Act (49 Stat. 847, 16 U. S. C. 791a *et seq.*) will be found in the pamphlet copies of the Act which have been filed with the Clerk. Other pertinent statutory provisions and regulations are set forth in the Appendix, *infra*, pp. 55–64.

STATEMENT

The Idaho Power Company on February 7, 1950, filed a petition (R. 1–5) in the Court of Appeals for the District of Columbia Circuit, under Section 313 (b) of the Federal Power Act (49 Stat. 847, 16 U. S. C. 791a *et seq.*) and under Section 10 of the Administrative Procedure Act (60 Stat. 243, 5 U. S. C. 1009), to review the inclusion of certain conditions in an order of the Federal Power Commission, dated October 13, 1949. This order (R. 99–110) authorized issuance of a license under Part I of the Federal Power Act for the construction, operation, and

maintenance, on and along the Snake River, in Idaho, of a proposed major hydroelectric power project, to be known as the Bliss development, consisting of a dam, powerhouse, transformers, a switchyard and two primary transmission lines.

The proposed project, exclusive of transmission facilities, would occupy 509.7 acres of lands of the United States in the State of Idaho (R. 102); and the two transmission lines, extending a total length of about 189 miles, would cross lands of the United States for a distance of more than 125 miles (R. 101). One of these lines, about 73 miles long, leads northwesterly from the Bliss plant to a point near the city of Boise, and the other, about 116 miles long, easterly to a point near the city of American Falls, both in the State of Idaho, at which points the lines would join with the Company's interconnected transmission system (R. 100–101).

The administrative proceedings before the Commission which culminated in the issuance of this license began on August 22, 1947, when the Idaho Power Company filed, under Section 4 (e) of the Act, its original application for the project (R. 26–33). This application did not propose the two long transmission lines to Boise and American Falls which were authorized by the Commission's order of October 13, 1949. (The Company did not propose these lines until its amended application of April 20, 1949, *infra*, p. 6.) In

the original August 1947 application, the Company stated, with respect to proposed transmission lines, that "The plant will be connected by tap line to the Company's 138-kv transmission network" (R. 28). The map of the proposed project area, submitted with the application, showed only two short tie lines connecting with the Company's Hagerman Valley-Boise and Hagerman Valley-Caldwell transmission lines, at points within about 6 miles from the proposed Bliss plant (Exhibit J). See also R. 34, 37, and the map at the end of this brief.[1]

On March 2, 1948, the Commission authorized issuance of a license for construction of the proposed project (R. 51–56). The Commission noted that "Although the applicant states that the power-house will be connected by tap lines to applicant's 138-kilovolt transmission network, neither the tap lines nor the switching station from which they emanate are shown to be within the project boundary on the maps submitted as part of the application." (R. 52.) Accordingly, the Commission expressly stated in paragraph 23 (g) of the order that it "reserves the right to

[1] In the amendments to the application, filed December 3, 1947, the Company did not indicate any change in the proposed transmission lines, the description being in *haec verba* identical with the original application. See R. 38. The project area map submitted with the amendments, however, did not show the termini of the proposed tap lines. (Exhibit K, dated November 1947.)

determine at a later date what transmission facilities should be included in the license as part of the project." (R. 55.)

On April 20, 1949, the Company filed an "application for supplementary amendments" to its application for license, so as to include as part of the proposed project the two primary transmission lines eventually incorporated in the Commission's order of October 13, 1949 (R. 58–60).[2] The cost of the project as originally applied for, without the transmission lines to Boise and American Falls, was estimated at $12,595,000 (R. 43). The estimated cost of the transmission lines, submitted with the amended application, was $3,400,000, raising the total estimate to $16,000,000 (R. 63). The area of lands of the United States affected by the original application, which was approximately 509.7 acres (R. 52), was increased to 1,240.93 acres as a result of the amended application (R. 81).

In response to an inquiry from the Commission concerning the amended application, the Secretary of the Interior advised the Commission, in a letter dated August 10, 1949 (R. 68–73), that on July 9, 1948, the Company applied to the Bureau of Land Management of the Department for a permit to construct over public

[2] The application showed that the two proposed transmission lines "are to be so constructed that they can without difficulty be converted for operation at 230 kilovolts, although initially they are to be operated at 138 kilovolts." (R. 101.)

lands a 230-kv transmission line, to be operated initially at 138-kv, which was to extend between Boise and American Falls, Idaho.[3] He also stated that the Department had for some time

[3] Although the Federal Power Commission is authorized to license "project works," including primary transmission lines, upon public lands and reservations of the United States (Section 4 (e) of the Federal Power Act), transmission lines on and over public lands which do not constitute "project" lines, as defined in Section 3 (11) of the Act, do not fall within the licensing authority of the Commission and remain subject to the jurisdiction of other governmental departments and agencies. See *Pacific Power and Light Co.* v. *Federal Power Commission*, 184 F. 2d 272 (C. A. D. C.). Section 3 (11) defines "project" to include "the primary line or lines transmitting power [from the project] to the point of junction with the distribution system or with the interconnected primary transmission system * * *."

The Secretary of the Interior has broad statutory authority, "under general regulations to be fixed by him," to permit the use of public lands, national forests, and reservations for electrical plants and transmission lines. 43 U. S. C. 957, 959, 961, *infra*, pp. 55–58. As appears *infra*, pp. 12–14, the Secretary of the Interior filed a formal complaint with the Commission in this case to urge that the proposed transmission lines were not "project" lines within Section 3 (11) of the Act, and hence that the Commission lacked jurisdiction to grant a license with respect to such lines (R. 111, 114–115). The Secretary of the Interior has not abandoned this position, and has specifically reserved on the record the right to renew such contention if it should be held that the Commission lacked authority to impose the conditions challenged by the Company in the present review (R. 119–121). An earlier suit brought to enjoin the construction of the transmission lines involved here did not deal with whether they were "project" lines but only with the initial jurisdiction of the Commission to determine the question upon the filing of a license application. *United States* v. *Idaho Power Company*, 85 F. Supp. 913 (D. Idaho).

been vitally concerned with the supply of power in the southern part of Idaho, that the Federal Government had hydro-electric projects in the area, and that other Federal projects were either under construction or had been authorized to be constructed.[4]

The Secretary's letter went on to state as follows: Prior to the Idaho Power Company's application for a permit to erect the transmission lines over the public lands, the Bureau of Reclamation and the Bonneville Power Administration had prepared a report entitled "Report on Availability of Power in Southern Idaho for Development of Phosphate Industry" which proposed that the United States construct, own, and operate a transmission line connecting the eastern and western parts of the southern Idaho region, the same area served by the two proposed transmission lines involved here.[5] This report was transmitted to the Idaho Power Company with a request for a conference to explore the

[4] Federal power projects in the area include Minidoka, Boise River, Black Canyon, and Anderson Ranch; under construction or authorized are Palisades and American Falls. *Annual Report of the Secretary of the Interior* (1961), pp. 136, 138–139, 143. (See map at the end of this brief.)

[5] This report discloses a plan for the ultimate delivery of power from the Bonneville Power Administration to Pocatello and the phosphate loads in that vicinity by a transmission system which in part parallels the Boise-American Falls lines involved here (Report, pp. 9–13, and map following p. 11).

possibility of cooperative arrangements in order to supply power for potential phosphate producers as soon as possible. Before any substantial discussions took place, the Company applied to the Bureau of Land Management of the Department of the Interior for the permit under which it, rather than the Federal Government, would own and operate this important tie line. (R. 69.)

The Secretary of the Interior stated, further, that extensive negotiations followed in which the representatives of the Department took the position that if the public lands of the United States were to be used by the Company for the construction of such an important part of the future power system of the region, the public interest required that the ownership and operation of this line by the Company should not interfere with the later development of federally owned power generating and marketing facilities, and that there should not be any wasteful duplication of transmission facilities. Since the Company had not shown a present need for a 230 kv line, the Department of Interior proposed to grant a preconstruction permit and later a permit or easement for the necessary right-of-way, subject, however, to the right of the Government to transmit its power over this line to the extent of its unused capacity, upon the payment of an equitable share of the opera-

tion and maintenance cost proportionate to the capacity used. (R. 69.)

In negotiations with the Department of the Interior, the Company resisted the suggested condition that the unused capacity of the line over federal lands be made available for transmission of Government power upon payment of just compensation (R. 71, 88–90). On April 11, 1949, nine days before the filing of its amended application with the Federal Power Commission (*supra*, p. 6), the Company withdrew its application from the Department of the Interior (R. 71).

The Secretary of the Interior urged upon the Commission that the proposed transmission lines were intended to be an important part of the Company's transmission system itself, and, therefore, main trunk lines, subject to his jurisdiction, rather than project lines within the Commission's jurisdiction (R. 69–70). He stated that the Company originally planned to place the power from the Bliss project on its existing lines at the Hagerman switchyard by means of a relatively short transmission line (R. 70), and that the lines which the Company sought in its amended application "constitute substantially the line for which the Company negotiated with this Department" (R. 71).[6] The Secretary expressly

[6] The various transmission lines involved in this case, and their geographical relation to one another, are shown on the map at the end of this brief.

charged that the amended application was filed for the sole purpose of ousting his jurisdiction, in order "to avoid the requirements of law that such transmission lines could be constructed on these public lands only after obtaining a permit or easement from the Secretary of the Interior" (R. 71).

The Company, in a letter to the Commission dated September 9, 1949, denied that its proposal to construct the additional facilities was prompted by the announcement of the Interior Department's transmission program, and stated its belief that the proposed lines were project lines subject to the jurisdiction of the Commission (R. 82–91).

On October 13, 1949, the Commission entered an order superseding its order of March 2, 1948 (*supra*, pp. 5–6), and reauthorized the license for the Bliss project, including the two proposed transmission lines (R. 99–110).[7] As a result of suggestions of the Secretary of the Interior (R. 94–95, 101), paragraph (F) of this order required, as a condition of the license, that the licensee permit the interconnection of transmission facilities of the United States with the two transmission lines, and the transfer over those lines of energy generated in power plants owned by the United States "in such amounts as

[7] No hearing was requested by the Company or held by the Commission on either the original application for the Bliss plant or the amended application for the transmission lines (R. 126).

will not unreasonably interfere with the licensee's use of said lines" (R. 107–110). The Company was to be compensated in full for any transmission of Government power (R. 108).

The Commission expressly found, in accordance with the statutory requirements (Section 10 (a)), that "under present circumstances and conditions and upon the terms hereinafter imposed, the project is best adapted to a comprehensive plan for the improvement and utilization of water power development and for other beneficial public uses, including recreational purposes" (R. 102–103).

On October 13, 1949, the same day that the Commission's order was issued, the Secretary of the Interior filed a formal complaint against the Idaho Power Company "to protect our procedural rights before the Commission" (R. 110), in which he reiterated the views formerly expressed by letter and requested that the Company's application be dismissed or denied (R. 111–115). After learning that the amended license had been authorized with the described conditions, the Secretary of the Interior on November 17, 1949, wrote the Commission (R. 119–121) that the attachment of the conditions to its order was "a great forward step * * * in the protection of the Government's interests." (R. 119.) The letter stated (R. 119–120):

> The principle that transmission facilities constructed over Government lands

should be made available, to the extent of their unused capacity, to the United States upon reasonable terms is important both to the utilities and to the United States. It is important to the utilities, because it means that transmission capacity will not be wasted and that there will be a more economical use of transmission facilities in the public interest. It is important to the United States, because it means avoidance of wasteful duplication of facilities, and therefore, more economical development and utilization of the vast potential hydroelectric resources in the Western States.

As you know, the Idaho Power Company made every effort to escape substantially the same requirements of this Department covering the use of public lands for the construction of transmission lines. It is, therefore, most gratifying that the Commission moved so promptly in applying the principle of uniformity of governmental purpose, by making it impossible here for this or any other company to submit to the jurisdiction of one agency of Government as an escape or protection from another.

The letter stated, further, the Secretary's understanding that if the Commission was precluded by the courts from requiring the conditions, the lands involved would be returned to the jurisdiction of the Department so that the terms of its regulations imposing similar conditions

might be put into effect (R. 121). The Acting Chairman of the Commission replied that the Secretary of the Interior was correct in understanding that "if the Commission is found to be without jurisdiction, the lands will be returned to the Department of the Interior." (R. 122.)

The Company's petition for review in the Court of Appeals prayed that the court modify the Commission's order by striking paragraph (F), remand "the cause to the Commission for further action consistent with the determination of this Court," and grant other appropriate relief (R. 5).

The court below held that Congress had withheld from the Commission authority to prescribe the challenged condition (R. 6–13). Its opinion, as originally filed on May 10, 1951, stated in the final paragraph (see R. 15):

> The order of the Commission will be modified by the elimination therefrom of paragraph (F), and the case will be remanded to the Commission for the entry of an order in accordance with this opinion.
>
> Remanded for modification of order.

Being uncertain whether the court's opinion and judgment "requires the Commission to enter an order in the exact form of the original order, after eliminating paragraph (F), or whether the Commission is free to reconsider the remainder of the order and to enter such other order as it deems warranted in the exercise of its administra-

tive discretion under the Federal Power Act" (R. 15), the Commission thereafter moved for clarification of the judgment to make it clear that upon remand the Commission would be free to determine whether or not issuance of the license without the conditions contained in paragraph (F) would be in the public interest (R. 15–16).

On September 21, 1951, the court entered an order modifying its opinion by substituting, in place of the paragraph quoted above, the following (R. 16):

> The order of the Commission will be modified by the elimination of paragraph (F), and the order as thus modified will be affirmed. 49 Stat. 860 (1935), 16 U. S. C. A. Sec. 825l (b).
>
> Modified, and affirmed as modified.

INTRODUCTION AND SUMMARY OF ARGUMENT

The effect of the decision below is to compel the issuance of a license to the Idaho Power Company without the conditions, found by the Commission to be required if a license were to be granted, for the "wheeling"[8] of power generated by the United States. This was a license to construct a private electric power project on public lands, which the Federal Power Commission could grant only upon a finding that the the project is "best adapted to a comprehensive

[8] *I. e.*, transmission of another's power over one's lines.

plan * * * for the improvement and utilization of water-power development, and for other beneficial public uses * * *; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project * * * before approval." (Section 10 (a).) The Act also specifically provides that all licenses shall be subject to "such other conditions not inconsistent with the provisions of this Act as the Commission may require." (Section 10 (g).) In this case the Commission found that the proposed project would meet the statutory standards if the license contained the condition for transmission of Government power on the available excess capacity of the lines.

The court below has in effect substituted its own judgment with respect to satisfaction of the statutory standards for that of the agency to which Congress had confided the determination of this question, contrary to well-established principles defining the relationship and complementary functions of administrative agency and reviewing court. Under these principles, even if no authority existed in the Commission to include the disputed conditions, the proper procedure was to remand the proceedings to the Commission for a determination of whether a license without these conditions would meet the standards of public interest specified by the statute.

Apart from its erroneous assumption of an administrative function belonging exclusively to the

Commission, the court below also incorrectly held that the Commission lacked authority to include the conditions in the license. The authority exercised by the Commission in this case derives from specific provisions in Part I of the Federal Power Act, which deals with the licensing of power projects on public lands or on waters subject to federal control. Part II of the Federal Power Act, enacted in 1935, in which the court below found a limitation on the powers vested in the Commission by Part I, is a comprehensive scheme for the federal regulation of the interstate transmission of electric energy. Part II specifically authorizes the Commission in Section 202 (b) to direct interstate public utilities (i. e., companies subject to regulation under Part II) to interconnect their transmission facilities with the facilities of others. It nowhere in terms prohibits interconnection with Government lines. Section 201 (f), relied on by the court below, provides only that nothing in Part II shall apply to the United States. The legislative history makes clear that the purpose of this provision, so far as pertinent here, was only to withhold from the Commission power under Part II to direct companies subject to its regulatory authority under that Part to interconnect with Government transmission lines. There is no suggestion, either in the terms of the statute or in the legislative history, that this limitation with respect to the regulation of facilities of interstate public utilities

under Part II had any relation to the licensing powers granted the Commission in Part I, including the power to determine what conditions were required by the public interest to be attached to a license for the construction of a new private power project on Government-owned lands. Hence, contrary to the view of the court below, the inclusion of these conditions for interconnection with Government power lines, in a license under Part I to use public lands for constructing a private commercial hydroelectric project, was "not inconsistent" with Section 201 (f), or indeed with any other provision of the Act.

ARGUMENT

I

Even if the conditions which the Commission attached to its order were unlawful, the Court of Appeals erroneously exercised an administrative function, beyond the proper limits of judicial review of administrative action, in modifying the license by eliminating the conditions

A. An exercise of the Commission's judgment is required by statute

Part I of the Federal Power Act (49 Stat. 847), which was originally enacted in 1920 as the Federal Water Power Act (41 Stat. 1063), authorizes the Federal Power Commission to issue licenses for the use of public resources in the construction, operation, and maintenance of privately owned hydroelectric projects under appropriate conditions for the protection of the public interest. (Section 4 (e).) The Act es-

tablishes large areas for the exercise of administrative judgment and confers broad powers upon the Commission.

Under the statute, each "license shall be conditioned upon acceptance by the licensees of all the terms and conditions of this Act and such further conditions, if any, as the Commission shall prescribe in conformity with this Act * * * ." (Section 6.) One of the specified statutory conditions is that the project be such "as in the judgment of the Commission will be best adapted to a comprehensive plan * * * for the improvement and utilization of water-power development, and for other beneficial public uses." (Section 10 (a).) The Commission is further authorized "if necessary in order to secure such plan * * * to require the modification of any project and of the plans and specifications of the project works before approval" (*ibid.*) and to impose, in its discretion, "such other conditions not inconsistent with the provisions of this Act" as may be required. (Section 10 (g).) Orders of the Commission are reviewable in the courts of appeals, which are bound by the Commission's findings of fact "if supported by substantial evidence." (Section 313 (b).)

The Federal Power Act thus clearly requires, as a condition to the issuance of a license, "the judgment of the Commission" in the determination of whether, and on what terms, a proposed

hydroelectric project on lands of the United States should be licensed as best adapted to a comprehensive plan for the improvement and utilization of water power development and for other beneficial public uses. In this case, the Commission exercised such a judgment in determining that the Bliss project will meet this test "under present circumstances and conditions and upon the terms hereinafter imposed" (R. 102). But the Commission has not decided, and it has been denied the opportunity to decide, whether the project will fulfill the Act's requirements if the prescribed terms and conditions are omitted or changed.

It is clear from the terms of the order that the conditions prescribed are an inextricable part of the finding which the statute required the Commission to make before it could approve the license. The Commission has made no finding with respect to the license shorn of the conditions and, until it does make such a finding, it has no authority under the statute to approve the license. The rule is settled that in the absence of basic findings, no order of an administrative tribunal can be sustained. *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 431–433; *Florida* v. *United States,* 282 U. S. 194, 215; *Mahler* v. *Eby,* 264 U. S. 32, 43–45; *Wichita R. R.* v. *Public Utilities Commission,* 260 U. S. 48, 59. See also dissenting opinion of Mr. Jus-

tice Stone in *United States* v. *Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311, 342–344. In disregard of this rule, the decision below leaves in effect an order which the Commission not only did not enter but which, in the absence of the statutory finding which only the Commission could make, it was without authority to enter.

Not only did the court below leave in effect an order not supported by the requisite statutory finding, but, in modifying the license to delete a condition deemed necessary by the Commission, it also left in effect an order which the Commission never made and which is substantially different in character from the order which the Commission did make. The change in the order was not made by the Commission but by the court below, which has assumed the power to rewrite and revise the provisions of the order. In so doing, the court has attempted to exercise an administrative function delegated by Congress to an administrative tribunal. It is immaterial that the Commission may have invalidly prescribed the terms and conditions which it imposed upon the license. The fact remains that the sole tribunal empowered to grant the necessary authority has granted it only subject to such terms and conditions.

B. This judgment cannot be exercised by the reviewing court

If the court purported to make the necessary findings and exercise administrative judgment,

it acted in disregard of the firmly established principle that the courts will stay their hands until the expert administrative agency to which Congress has entrusted a policy or factual determination has had an opportunity to act. *Far East Conference* v. *United States,* 342 U. S. 570; *Tank Car Corporation* v. *El Dorado Terminal Co.,* 308 U. S. 422, 432–433; *St. Louis, Brownsville & Mexico Ry. Co.* v. *Brownsville Navigation District,* 304 U. S. 295, 301; *Southern Ry. Co.* v. *Tift,* 206 U. S. 428, 437–438; *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426, 448; see also *United States* v. *Interstate Commerce Commission,* 337 U. S. 426, 437; *United States* v. *Jones,* 336 U. S. 641, 652–653, 670–671, 672–673.

The most recent statement of the rule requiring judicial deference to primary administrative jurisdiction is found in *Far East Conference* v. *United States, supra,* where the Court "applied a principle, now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over" (p. 574). The Court also stressed the policy of achieving "uniformity and consistency in the regulation of business entrusted to a particular agency * * * by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agen-

cies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure" (pp. 574–575).

And the same principle has been applied in circumstances like these, where some aspect of administrative action has been held beyond the agency's authority. It has been recognized that the administrative judgment may be affected by the new situation which the limitation of its power creates. Accordingly, remand of the proceedings to the administrative agency for the exercise of its expert judgment in the light of the changed circumstances has been deemed the proper procedure. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 55; *Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 612–614; *Addison* v. *Holly Hill Co.*, 322 U. S. 607, 618–619; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 145; *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364, 373–374; *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, 218.

Statutory requirements for initial administrative determinations are frustrated if the reviewing court attempts to prejudge the administrative result by assuming that invalidation of part of an order would not affect the administrative judgment with respect to the remainder. Correction

of an error of law in the agency's determination exhausts the judicial power. *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134. Judicial review of a legal question "does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge" and the Commision is "again charged with the duty of judging the application" by the applicable statutory standard of "public convenience, interest, or necessity." 309 U. S. at 145.

Accordingly, in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, recognition that two invalidated qualifying clauses "constitute an important limitation" to the Commission's order prompted the Court to give the Commission "an opportunity to reconsider the entire provisos in light of our rejection of the qualifying clauses, and to refashion these provisos as may be deemed necessary." 334 U. S. at 55. Similar deference to the exercise of administrative discretion was paid in *Addison* v. *Holly Hill Co.*, 332 U. S. 607, where the writing of a definition committed by Congress to agency determination, after invalidation of a part, was returned to the Administrator because "It would be the sheerest guesswork to believe that elimination of an important factor in the Administrator's equation would have left his equation unaffected even if he did not here

insist upon its importance." 332 U. S. at 618–619. And in *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212, where complete suppression by the Federal Trade Commission of misleading trade names was held too drastic, correction of the order was deemed "a matter which the commission has not considered but which, as the body having primary jurisdiction, it should, in the first instance, consider and determine." 288 U. S. at 218. See also *Reconstruction Finance Corporation* v. *Bankers Trust Co.*, 318 U. S. 163, 170; *United States* v. *Baltimore & Ohio Railroad Company*, 284 U. S. 195, 203.

The appropriate scope of judicial action is not enlarged by the statutory provision for review of Commission orders which authorizes the courts "to affirm, modify or set aside such order in whole or in part." (Sec. 313 (b).) This language does not empower a reviewing court to exercise an essentially administrative function, or permit judicial determination of the statutory policy committed to an administrative agency. Similar language for judicial review was involved in *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364, where the "familiar appellate practice" of remanding causes to the administrative agencies for appropriate action is described (305 U. S. 373–374), and in *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212; *Siegel Co.* v. *Federal Trade Commission*, 327

U. S. 608; and *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, where judicial invalidation of administrative action resulted in remand rather than exercise by the courts, in the first instance, of the agency function.[9] And see *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U. S. 515, 532–536.

Inherent in the refusal of the court below to remand the question of issuing the license for Commission redetermination is the assumption that the court was authorized to decide, as an original matter, unaided by prior Commission action, that the proposed project, without the important condition, was "best adapted to a comprehensive plan * * * for the improvement and utilization of water-power development, and for other beneficial public uses." This would appear to be exercise of an administrative rather than a judicial function (see *Federal Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266) which is inconsistent with other provisions of the Act. If Congress had intended to establish the Court

[9] This Court has affirmatively indicated that it regards judicial review under the Federal Power Act as essentially the same as the traditional limited review of administrative action. *Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608, 612, note 3; *Federal Power Commission* v. *Pacific Power & Light Co.*, 307 U. S. 156; *Federal Power Commission* v. *Metropolitan Edison Co.*, 314 U. S. 375; see also, *Savannah River Electric Co.* v. *Federal Power Commission*, 164 F. 2d 408 (C. A. 4).

of Appeals as "a superior and revising agency in the administrative field," then "its decision was not a judicial judgment reviewable" by the Supreme Court. 289 U. S. at 274; *Federal Radio Commission* v. *General Electric Co.*, 281 U. S. 464; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 144. But Congress obviously had no such intention because Section 313 (b) specifically provides that the judgment of the reviewing court shall be "subject to review by the Supreme Court of the United States upon certiorari or certification as provided in * * * the Judicial Code, as amended." [10]

C. A remand is required unless the agency clearly manifests its intention to permit the modified order to stand

To require remand to the Commission where the invalidation of parts of an order vitiates the agency's finding does not foreclose the possibility of judicial modification in other circumstances. In a manner somewhat analogous to dealing with the separability of invalid provisions of a statute (cf. *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 362), part of an order may be eliminated and the remainder upheld where it is clearly manifest that the provisions of the order

[10] Moreover, the other provisions of Section 313 (b), relating to the conclusiveness of the Commission's findings of fact "if supported by substantial evidence," and to the procedure for taking additional evidence, clearly contemplate the traditional relationship between the administrative agency and the reviewing court.

are entirely separable and that the agency plainly intended that the remaining portion should continue in effect even though the rest be stricken."[11] See *United States* v. *Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311. In that case an order of the Interstate Commerce Commission was affirmed although certain conditions were invalidated. The majority opinion indicates, however, that it was based primarily on the view that the subject matter of the condition had no relation whatever to the subject matter of the proposal for which authority was sought and that the Commission had dealt with the condition "as an independent and separate matter" (p. 330). Consequently, the Court, in an opinion by Mr. Justice Sutherland, regarded the condition as being a separable and collateral part of the order which was not germane to the remaining parts. On the other

[11] This explains court decisions enforcing less than an entire order of an administrative agency which prohibited various types of conduct as violative of statutory standards committed to initial administrative enforcement. *National Labor Relations Board* v. *United States Truck Co.*, 124 F. 2d 887 (C. A. 6); *Alberty* v. *Federal Trade Commission*, 182 F. 2d 36 (C. A. D. C.); *Gimbel Bros.* v. *Federal Trade Commission*, 116 F. 2d 578 (C. A. 2); *Educators Ass'n* v. *Federal Trade Commission*, 108 F. 2d 470, modified, 118 F. 2d 562 (C. A. 2); *Belmont Laboratories* v. *Federal Trade Commission*, 103 F. 2d 538 (C. A. 3). To the extent that these decisions modify the remedy prescribed they are consistent with the principle stated since it is clear that the agency would not want to abandon enforcement because the method of enforcement was modified.

hand, the dissenting Justices (Holmes, Brandeis, and Stone) were of the opinion that the entire order was a unity, that the Commission intended it to be considered as such, and, therefore, that the condition could not be eliminated without impairing the entire order.

Unless it is clear, therefore, that the Commission would have authorized the license without the conditions, the entire order must stand or fall. See *United States* v. *Lowden*, 308 U. S. 225, 229. Here there is no question but that the subject matter of the conditions is intimately related to the subject matter of the license and that the conditions are an inextricable part of the license which the Commission authorized. That the Commission in authorizing the license plainly intended the conditions to be inseparable is clearly shown on the record.

The record makes clear that the Secretary of the Interior would interpose strenuous objections to issuance of the license without the condition requiring interconnection. This is plain not only from the letters setting forth his views (R. 68–73, 94–95), but is emphasized by his filing of a formal complaint to protect the procedural rights asserted by him (R. 110–115). Opposition of the Secretary of the Interior to the jurisdiction of the Commission and to the issuance of the license was withdrawn only as a result of inclusion of the conditions in paragraph (F) (R. 119–

121). *Supra,* pp. 12–14. The action of the court below would deprive the Commission of the benefit of the views of the Secretary of the Interior in a full hearing on his objections to a grant of the license without such conditions.

The Commision's finding on March 2, 1948, on the original application, that the statutory standard had been satisfied without the condition here in question, did not relate to these transmission lines, which were not described in that application. *Supra,* pp. 4–6. The condition was later imposed because of the amended application for a license to construct transmission lines, which are an important part of the project. The signifinance of the change in the proposed project is evidenced by the fact that it added almost 200 miles of transmission lines at a cost of $3,400,000 and affected some 700 additional acres of public lands. *Supra,* p. 6. Moreover, the need for transmission lines available to carry Government power in the area and from Bonneville across southern Idaho for use in connection with development of the phosphate industry would be an important factor in determining whether a license without these conditions would satisfy the statutory requirement of comprehensive development and utilization. The prior findings, therefore, are not relevant to this aspect of the project. The adequacy of the Commission's finding, as a factual matter, that the

condition to the license for the transmission lines was necessary to satisfy the statutory standards, has not been challenged (R. 117, 124).

In these circumstances, if the condition imposed by the Commission was unauthorized by law, the proper procedure was to remand the cause to the Commission for further proceedings consistent with the court's ruling. This would permit the primary determination by the Commission of compliance with the statutory standards, in the absence of an invalid condition. Its new findings would, of course, be conclusive if supported by substantial evidence on the record as a whole. In precluding the exercise of such administrative judgment by eliminating a condition found appropriate by the Commission to satisfy the statutory standard of public interest, and by making the order effective without the condition, the decision below plainly contravened established standards of judicial review.

II

The Commission is authorized under the Act to condition a license to exploit public resources upon the licensee's transmission of Government power

The court below not only misconceived the scope of its own authority in reviewing orders of the Commission, but also, we submit, misconstrued the extent of the Commission's licensing powers under Part I when it held that a require-

ment of interconnection with Government transmission lines as a condition to the private use of public resources was unauthorized because Congress had withheld authority under Part II to require interconnection with Government lines in the regulation of use of their own resources by interstate utilities.

Under the Constitution, Congress acts as the proprietor of Government lands and, as this Court said in *United States* v. *City and County of San Francisco*, 310 U. S. 16, 29, "The power over public land thus entrusted to Congress is without limitations." See also *Hamilton* v. *Regents of University of California*, 293 U. S. 245, 258; *Sinclair* v. *United States*, 279 U. S. 263, 297. The court below recognized the plenary power of Congress over the public lands and its authority to impose conditions without limitation, but construed the Federal Power Act as denying the authority which the Commission here exercised. It pointed out that Section 10 (g) in Part I, upon which the Commission in part relied, permits only such license conditions as are "not inconsistent with the provisions of this Act," interpreted Part II of the Act as prohibiting the Commission from requiring interconnection of Government lines with private lines, and concluded that the condition in question was therefore inconsistent with the Act.

A. Statutory language and background

Neither the statutory provisions nor the legislative discussions, particularly in the light of the historical background of power regulation, justify this restriction upon the Commission's licensing authority over private exploitation of Government lands. The present Federal Power Act embodies three major enactments. The original statute—the Federal Water Power Act of June 10, 1920, 41 Stat. 1063—created the Federal Power Commission and established complete machinery for licensing the construction, operation, and maintenance of water power projects on public lands. The Act of June 23, 1930, 46 Stat. 797, reorganized the Federal Power Commission, substituting an independent agency for the former commission consisting of the Secretaries of the Departments of War, Interior, and Agriculture. The Public Utility Act of August 26, 1935, 49 Stat. 838, provided a scheme for regulation of public utility holding companies by the Securities and Exchange Commission in Title I, and contained amendments and additions to the Federal Water Power Act in Title II.

Title II, designated the "Federal Power Act," was itself divided into three parts, relating (1) to amendments to the existing Federal Water Power Act, (2) to regulation of public utility companies engaged in interstate commerce, and (3) to pro-

cedural and administrative provisions applicable both to licensees and public utilities. This title gives the original Water Power Act, as amended, the heading "Part I," and numbers the two new parts as Part II and Part III.

Part I relates exclusively to provisions for the improvement of navigation, the development of water power, and the use of public lands in relation thereto, and the Commission acts through the issuance of licenses to make use of Federal water power and public lands. Reenacted in substantially the same language in Part I of the 1935 Act were various specific provisions of the Federal Water Power Act of 1920, which, taken separately or together, leave no room for doubt that, under the 1920 Act as carried over into Part I, the Commission was given ample affirmative authority to impose conditions like those involved here upon the grant of a license to use public lands for purposes of constructing a private power project. These provisions will be discussed later in this brief, *infra*, pp. 46–50. It suffices here to note the following sections of Part I:—

Section 6; "* * * Each such license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this Act and such further conditions, if any, as the Commission shall prescribe in conformity with this Act, which said

terms and conditions and the acceptance thereof shall be expressed in said license. * * * ".

Section 10:

"All licenses issued under this Part shall be on the following conditions:

(a) That the project adopted * * * shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan * * * for the improvement and utilization of water-power development, and for other beneficial public uses * * *; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project * * * before approval.

* * * * *

(g) Such other conditions not inconsistent with the provisions of this Act as the Commission may require.

Section 4:

The Commission is hereby authorized and empowered

* * * * *

(g) Upon its own motion to order an investigation of any occupancy of, or evidenced intention to occupy, for the purpose of developing electric power, public lands * * * and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region.

Obviously, avoidance of wasteful duplication of transmission facilities by requiring the fullest utilization of existing lines could properly be regarded by the Commission as relevant to "the improvement and utilization of water-power development" (Section 10 (a)), and as a means "appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region" (Section 4 (g)).

Part II, added by the 1935 Act, relates exclusively to the regulation of utility companies engaged in the interstate transmission and sale of electric energy. Part II is an exercise of the commerce power, and not of the power over public lands. The authority to establish power supply regions and to require interstate utility companies to interconnect and coordinate their transmission and generating facilities (Section 202 (a) and (b)), specifically made inapplicable to the United States, was part of this new field of regulation.

The court below did not deny that the Commission had authority under the 1920 Act to require a private power company to transmit Government power as a condition to exploiting public resources and using public lands. It did hold, however, that such authority was withdrawn in 1935, because Part II did not confer authority to require transmission of Government

power over lines, not requiring a license, owned by interstate public utilities: But the pertinent provisions of Part II relied on by the court at most spell out a lack of authority in connection with the creation of a new and additional field of regulation; and there is no indication of any intention to withdraw or limit the authority which the Commission unquestionably had under the provisions of the Federal Water Power Act of 1920, which were carried over into Part I of the 1935 Act (*supra,* pp. 34–36).

Section 202 (a) of Part II requires the Commission to divide the country into regional districts for the voluntary interconnection and coordination of electric power facilities. Section 202 (b) authorizes the Commission under prescribed conditions to "direct a public utility * * * to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged in the transmission or sale of electric energy." Section 201 (f) provides that "No provision in this Part shall apply to, or be deemed to include, the United States * * *." The court held that these provisions prevented the Commission, in the exercise of its licensing powers under Part I, from requiring licensees, as a condition to the use of public lands for private transmission facilities, to transmit electric power of the United States upon payment of reasonable compensation to the extent of available excess capacity.

The grant of new regulatory powers to the Commission ~~contained~~ in Part II contained no limitation, express or implied, on the Commission's existing licensing authority under Part I and the Federal Water Power Act of 1920. Before the enactment of Section 202 of Part II in 1935, the statute contained no provision authorizing the Commission to require the interconnection of transmission lines of public utilities in interstate commerce. But no such provision was needed in order to authorize the Commission, in exercising its power to license projects on public lands, to require interconnection of project lines with Government lines. Hence the only effect of Section 201 (f), as applied to this problem, is to make the authority of the Commission granted in Section 202 of Part II, to require interconnection of transmission lines of utility companies engaged in interstate commerce, entirely inapplicable to the United States or any of its agencies or instrumentalities. S. Rep. 621, 74th Cong., 1st Sess., p. 19.

Section 6 empowers the Commission to prescribe conditions "in conformity with this Act," and Section 10 (g) uses similar language in authorizing "such other conditions not inconsistent with the provisions of this Act as the Commission may require." If a Commission action constitutes an appropriate and lawful exercise of its licensing powers

under Part I, such action is not rendered unlawful merely because the Commission could not have taken it under the independent regulatory powers granted in Part II. It bears repetition that the transmission lines here involved were part of the "project" for which the Company sought a license under Part I; they were not transmission lines as to which no license was required and which were brought within the Commission's jurisdiction only by the regulatory authority under Part II.

B. Legislative history of the 1935 Act

The court below relied principally upon Section 10 (g), which authorizes the inclusion in project license orders of "such other conditions not inconsistent with the provisions of this Act as the Commission may require." The court thought these conditions were inconsistent with Part II, particularly Section 201 (f), and it placed great reliance upon the legislative history of the Act in reaching the conclusion which the statutory language itself obviously does not require. The opinion states (R. 10–11):

> The question whether the United States should require a private company, licensed to construct a private power plant on public lands or to cross public lands with its transmission lines, to interconnect its facilities with public power projects, was a major one in the consideration of the poli-

> cies and terms of power development upon public property. It was a highly controversial issue. During the course of the consideration of the bill which eventually became the Federal Power Act, the subject was broached at least three times, and upon each occasion the witness testifying on behalf of the bill as the representative of the Power Commission assured the Congress that the proposed bill did not make it possible for the Government to utilize the transmission lines of private companies or to require the transmission of power generated by a Government plant over the lines of private operating companies. * * *

The court then quoted the testimony of Mr. Dozier DeVane, at that time Solicitor of the Federal Power Commission, before a Congressional committee (R. 11). But this very testimony demonstrates that the court below misunderstood its effect and plainly shows that none of it related to interconnection with proposed lines of applicants for licenses seeking permission to use public lands, as the court below thought. Mr. DeVane's prior general explanation of the structure of Title II of the 1935 Act makes clear that Part II [12] was not intended to amend in any

[12] While under discussion before the committees of Congress, what are now referred to as Parts I, II, and III of the Federal Power Act were referred to as Title I, Title II, and Title III of Title II, respectively.

way the licensing provisions of the Water Power Act included in Part I.[13] And Mr. DeVane's specific discussion of interconnection shows that it did not relate to the Commission's licensing power under Part I, but only to the new regulatory powers conferred by Part II and the Commission's authority to require interconnection of transmission lines under Section 202 (b) of Part II.[14]

[13] Mr. DeVane's testimony is as follows (Hearings before H. Interstate and Foreign Commerce Committee, 74th Cong., 1st Sess., on H. R. 5423, p. 459):

"Mr. Mapes. Until we get down to Title II of Title II of the bill, the provisions in this bill in Title II, that is in Title I of II, are amendments to the present Federal Water Power Act?

"Mr. DeVane. That is correct, sir.

"Mr. Mapes. And, Title II and Title III of Title II, are they entirely new matters?

"Mr. DeVane. Entirely new matters.

"Mr. Mapes. And you are not proposing to amend the licensing section or provisions of the Water Power Act?

"Mr. DeVane: The new matter makes no amendments to the licensing sections of the Water Power Act. In Title III of the present Act have been brought forward some of the provisions that are purely administrative in character that now appear in the Federal Water Power Act, and as I read those provisions I will explain how they are handled."

[14] Hearings before H. Interstate and Foreign Commerce Committee, 74th Cong., 1st Sess., on H. R. 5423, pp. 514–515:

"Mr. Wolverton. Under the provisions of this bill, would it be possible for the Government in any of its electric operations to utilize the transmission lines of private companies?

"Mr. DeVane. No, sir; and I want to make that very definite; and if there is any doubt about it, so far as I am concerned, such amendment might be made as to make it clear.

All discussion of "this bill" and the nature of the regulation is consistent only with the provisions of Part II. Mr. DeVane's definition (fn. 14) of the two purposes of the bill to "aid State regulation" and "to deal only with rates that State Commissions cannot regulate," applies exclusively to regulation of interstate utilities and has no application to licensing of water projects. His testimony (fn. 14) that the act excludes State, municipal, and Government projects from jurisdiction of the Commission, can only refer to Part II because, as the Solicitor of the Commis-

We have attempted in this bill, Mr. Wolverton, to accomplish these two purposes; One is not to supersede, but aid State regulation; and insofar as rates are concerned, to deal only with rates that State Commissions cannot regulate.

"We have, insofar as State, municipal, or Government projects are concerned, excluded them from the jurisdiction of the Commission or from coming under this act. We have been earnest and honest in our effort to accomplish this result. We think we have done it. If we have not and it is the desire of Congress not to bring Government projects under the jurisdiction of the Commission, or give the municipal or governmental projects the right to use the transmission lines of private industry—and we have not succeeded in making that clear in this bill—an amendment should be proposed that will do it better. It will receive our hearty endorsement.

"Mr. Wolverton. Let me suggest a possible situation. Your answer will clarify my mind considerably as to the effect of this bill in the particular instance: Assume that a municipality built a plant for the generation and distribution of electric energy; assume that a distant community is serviced by a company that comes under the regulation of this bill in that it procures its electric energy from outside of the State. Could the city which has constructed a plant, but has no

sion, he knew that state and municipal projects had been explicitly made subject to the licensing jurisdiction of the Commission in Part I since 1920. Surely, this answer did not nullify the provisions of Section 4 (e), authorizing states and municipalities to obtain licenses from the Com-

---

transmission lines, utilize the system of transmission lines constructed by the private company?

"Mr. DeVane. No, sir.

"Mr. Wolverton. Then, you do not think that the power given in this bill to the Federal Power Commission would enable it to direct that those transmission lines be so used?

"Mr. DeVane. Mr. Wolverton, my answer to that is this: That if there is any doubt about it and this committee can remove that doubt by additional words in this bill, let us put them in.

"Mr. Wolverton. I do not think that anybody could be more anxious to be fair.

"Yesterday you suggested an amendment with respect to rates that cleared up a situation which was not clear until you offered the amendment; and your willingness to suggest an amendment of that kind, if the committee deems it necessary, indicates your sincere effort to have no doubt as to the meaning of the language used.

"Mr. DeVane. I am sincere in all I say to you in connection with that matter. We are not attempting to get control in any manner of municipal, State, or Federal projects, or the energy produced by those projects. That is the Commission's position. The Chairman of the Commission just stated to me that I could announce that is the Commission's position in this matter.

"Mr. Wolverton. May I ask, did you participate in the drawing of this bill?

"Mr. DeVane. Of Title II of Title II.

"Mr. Wolverton. Yes.

"Mr. DeVane. Yes; sir; I participated in it, in making suggestions. I worked on it some; yes, sir."

mission for the construction of hydroelectric projects nor the provision of Section 7 (a) requiring that they be given preference, and it has never been so contended. Moreover, Mr. Wolverton's question about "a company that comes under the regulation of this bill in that it procures its electric energy from outside of the State," is pertinent only to jurisdiction under Part II, which is based on interstate transmission of energy, and has no application to jurisdiction over licensees for water power projects under Part I, which is based on the use of federal resources. Finally, any possible doubt concerning references to "this bill," throughout the discussion, is entirely removed when Mr. DeVane, in response to Mr. Wolverton's question if he helped "in the drawing of this bill," asked specifically whether Mr. Wolverton was referring to Title II (now Part II) of Title II, and Mr. Wolverton replied, "Yes."

Part II of the Federal Power Act marked a new venture of the Government in the regulation of public utilities, based upon the interstate transmission of electric energy, and constituted a complete departure from the previous system founded on the licensing of the construction and operation of hydroelectric projects in connection with the use of navigable streams or public lands. Mr. DeVane's testimony did no more than explain that it was not the purpose of the new legislation creating additional regulatory powers to author-

ize the Commission to require interconnection with Government lines by interstate public utilities being brought under regulation by Part II. This purpose was carried out by Section 201 (f) and other Senate committee amendments to the original bill.[15]

But failure to create authority under Part II to require interconnection in the regulation of the interstate transmission of power by private companies does not amount to a limitation of preexisting authority in the licensing of private persons to use public lands and federal water power.[16] The language of Part II is only that certain new powers are created and these new powers do not extend to Government lines. The decision below

[15] Section 201 (f) by its express terms merely exempts public agencies from the provisions of Part II. The Senate Committee Report, in discussing that new subsection, stated that one purpose was to make it clear that the Commission was not being given authority under Part II "to compel private utilities to establish connection or exchange power with public plants." S. Rep. No. 621, 74th Cong., 1st sess., p. 19. It may be noted that the Senate also amended the definition of "person" in Section 3 (4) so as to exclude public agencies; since the interconnection powers given the Commission in Section 202 (b) were limited to "persons," this amendment of Section 3 (4) also had the effect of preventing the Commission from requiring interconnection under Section 202 (b) with facilities of public agencies.

[16] It is possible that a company may come under Part I and not under Part II, since Part I applies to "licensees" and Part II to interstate public utilities, and these are not necessarily coextensive. Cf. *Pennsylvania Water & Power Co.* v. *Federal Power Commission*, 343 U. S. 414, 418.

would convert the limited grant of additional power into the repeal of authority previously enjoyed.

C. The decision below is inconsistent with general provisions in the Act relating to licenses

The interpretation of the court below not only is unsupported by the distortion of a limited grant into an affirmative prohibition but is inconsistent with the policy, expressed in various provisions of Part I, of using the public domain to advance the public interest and grant governmental priority. Perhaps most significant in this connection is the requirement of Section 10 (a) that licenses shall be granted only for such projects "as in the judgment of the Commission will be best adapted to a comprehensive plan * * * for the improvement and utilization of water-power development, and for other beneficial *public* uses, including recreational purposes." [Italics added.] Section 10 (a) also provides that "if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval."

Because of the relation of Government hydroelectric power projects to the Bliss project transmission lines, and the avoidance of wasteful duplication facilities thereby achieved, the Commission was justified in finding that the con-

ditions in question were necessary to satisfy the Section 10 (a)'s requirement of adaptation to a comprehensive plan for utilization of water power development.[17] Moreover, the specific provision authorizing modification of a proposed project before approval would seem clearly to establish the authority to modify the project by requiring interconnection with adjacent projects if such interconnection would be better adapted to the comprehensive plan. In authorizing such water power development as proposed in the Bliss project, the Commission may not limit its consideration to that plant alone but must necessarily consider the relationship of the Bliss project to the development of water-power resources in the area. This authority is confirmed by further express grant to the Commission in Section 4 (g) of authority to order an investigation of occupancy of public lands for the purpose of developing electric power "and to issue such order as it may find appropriate, expedient, and in the public interest to conserve and utilize the

[17] It should be noted that the Company has made no contention, either before the Commission or on this review, that no facts were shown to justify the imposition of the challenged condition (see R. 124). The sole contention is that, as a matter of law in construing the statute, the Federal Power Act affirmatively withheld from the Commission the authority to attach such conditions to license orders under Part I. Accordingly, there is no issue here whether, assuming the existence of such authority, the Commission properly exercised it in the circumstances of this case.

navigation and waterpower resources of the region." Consideration of regional development in the public interest is also required by Section 7 (a) which calls for the judgment of the Commission upon conflicting applications and issuance of the license to the applicant presenting plans which "are best adapted to develop, conserve, and utilize in the public interest the water resources of the region"; and Section 7 (b) requiring denial of an application for a project when in the judgment of the Commission federal development "of any water resources for public purposes" is desirable. These specific provisions granting affirmative authority in Part I, which except for Section 4 (g) were carried over from the 1920 Act, would seem sufficient to refute the nebulous suggestion of a prohibition under Part II which would act as a limitation upon comprehensive water resource utilization.

The paramountcy of the public interest in comprehensive water power utilization, as against private developers of public resources for electric power, is also manifested by such requirements as those for non-interference with reservations and the navigable capacity of navigable waters (Section 4 (e)), and for "the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of War, and such fishways as may be prescribed by the Secretary of

Commerce" (Section 18), as well as for the construction, "without expense to the United States," of a "lock or locks, booms, sluices, or other structures for navigation purposes" (Section 11 (a)).

Part I further limits the issuance of licenses for a period not exceeding 50 years (Section 6), contemplates that at the expiration of the license the United States shall have the right "to take over and thereafter to maintain and operate any project" upon appropriate payment to the licensee (Section 14), and provides that a license shall not be granted when "in the judgment of the Commission, the development of any water resources for public purposes should be undertaken by the United States itself" (Sections 7 (b) and 4 (e)). Provision is also made for giving preference to the applications of states and municipalities by Section 7 (a) and for the issuance of licenses for power development to states and municipalities without charge where "such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes" (Section 10 (e)).

These various provisions which amply reflect the general Congressional concern for giving protection and priority to the public as against private interests cannot be reconciled with the view of the court below that Congress expressed an intention to withhold from the Commission any

power to qualify a license for use of public lands for private commercial purposes, by attaching a condition for interconnection with Government lines, deemed necessary for effectuation of the public interest. The policy reflected in the Act by the simultaneous provision for public and private interests in power development is wholly consistent with such a condition. See *Report of the President's Water Resources Policy Commission* (1950), vol. 1, pp. 221–225.

D. The decision below is inconsistent with federal power policy

The court of appeals' decision entirely forecloses the Commission from taking account of the need for "wheeling" arrangements in the public power program, a problem which the activities of the Federal Government in the development of hydroelectric power in recent years have made one of great magnitude. This barrier to the coordination of public and private facilities presupposes an unexpressed Congressional hostility to the utilization of public power which is not reflected either in the statute or in the increased provision for the development of such power. A succession of related federal statutes belies any such hostility. (See, *e. g.*, Boulder Canyon Project Act (1928), 45 Stat. 1057; Tennessee Valley Authority Act, 48 Stat. 58 (1933); National Industrial Recovery Act, 48 Stat. 195 (1933) and Emergency Relief Act of 1935, 49

Stat. 115 (Bonneville Dam and Central Valley Project in California); Rural Electrification Act, 49 Stat. 1363 (1936); Flood Control Act of 1936, 49 Stat. 1570; Bonneville Project Act, 50 Stat. 731 (1937); Fort Peck Act of 1938, 52 Stat. 403; Reclamation Project Act of 1939, 53 Stat. 1187).

As a result of Congressional action, the present installed capacity of federal hydroelectric power projects is 6,278,500 kilowatts, which will generate 30 billion kilowatt hours annually. Plants under construction and authorized for future construction have a capacity of 16,988,000 kilowatts and will produce 80 billion kilowatt hours annually. *Report of the President's Water Resources Policy Commission* (1950), vol. I, pp. 221–223. In his Annual Report for 1951, p. 123, the Secretary of the Interior reports that in the fiscal year 1951 he disposed of 24,764,000,000 kilowatt hours of energy at a total revenue of over $67,552,000.

The increase in public power has been accompanied by the development of principles for marketing federal power inconsistent with the decision below. These principles, reflected in Congressional enactments from the Tennessee Valley Act in 1933 through the Flood Control Act of 1944, encourage the widest possible use of available electrical energy, provide reasonable outlets, prevent the monopolization of power by limited groups, and make the use of federal resources by private interests subject to provisions pro-

tecting the public interests in low-cost electricity. See *Report of the President's Water Resources Policy Commission* (1950), vol. 1, pp. 226–228.

Wheeling arrangements, similar to the conditions imposed by the Commission in this case, effectuate this legislative policy and can result in considerable economies to the United States in the construction of transmission and substation facilities whenever a utility system, either privately or municipally owned, can be utilized to transmit power to customers of the United States or to agencies of the United States. Such arrangements, which avoid duplication of facilities, are also plainly essential to the development of a comprehensive plan for the power resources of the area. It is impossible to estimate accurately the number of situations in which such arrangements will be desirable, but Federal transmission networks are being constructed in the Pacific Northwest, in California, in the Missouri River Valley, in the Southwest, and in the Southeast, thereby expanding opportunities for economic interconnections of this character. Annual Report of the Secretary of the Interior (1951), pp. XX–XXIII, 56, 58–59, 138, 152, 153–154.

Congress has also indicated on many occasions that it looks with great favor upon wheeling arrangements for the distribution of public power as an instrument for carrying out its power policy, and at the same time as a means of saving

Government funds and critical defense materials, of avoiding the duplication of transmission facilities, and of coordinating public and private power facilities. This is evidenced by the frequent insistence that the Department of the Interior attempt to negotiate wheeling arrangements before constructing its own transmission lines, and its deliberate prevention of monopoly bargaining power in private utilities by the appropriation of funds for the construction of public transmission lines where satisfactory wheeling arrangements cannot be negotiated. Public Law 136, 82d Cong., 1st Sess., p. 8; Public Law 470, 82d Cong., 2d Sess., pp. 1, 7; S. Rep. 661, 81st Cong., 1st Sess., pp. 4, 13, 14; S. Rep. 1941, 81st Cong., 2d Sess., pp. 125, 145, 150; H. Rep. 339, 82d Cong., 1st Sess., pp. 2–3, 11; S. Rep. 499, 82d Cong., 1st Sess., pp. 4, 5, 7, 23; H. Rep. 888, 82d Cong., 1st Sess., p. 5; S. Rep. 1803, 82d Cong., 2d Sess., p. 2; H. Rep. 1628, 82d Cong., 2d Sess., p. 2; 95 Cong. Rec. 14116–14117; 96 Cong. Rec. 10497; 97 Cong. Rec. 7785, 7786, 7787, 7796, 7847–7848; 98 Cong. Rec. (unbound ed.) 3008, 9302, 9321, 9543.

A further reason for rejecting the restrictive interpretation of the court below is that the scope of the authority to prescribe the terms of licenses for the use of federal facilities would vary with the federal agency exercising jurisdiction. Although the Federal Power Commission is authorized to license "project

works"[18] upon the public lands and reservations of the United States (Section 4 (e)), the Secretary of the Interior has general authority, "under general regulations to be fixed by him," to permit the use of the public lands, national forests, and other reservations for electrical plants and transmission lines. 43 U. S. C. 957, 959, and 961, *infra*, pp. 57–60. Pursuant to these statutory provisions, the Secretary has promulgated regulations requiring applicants for the use of public lands for these purposes to interconnect with federal lines and transmit government power.

The general regulations for the use of public lands provide that power permits will be granted only where "it is determined that the approval of the right-of-way will not be contrary to the public interest, including that of the Government." 43 C. F. R. 244.14, 17 Fed. Reg. 5899, *infra*, p. 60. The regulations relating to transmission lines provide that "by accepting a right-of-way for a power transmission line, the applicant thereby agrees and consents to * * * allow the Department of the Interior * * * to utilize for the transmission of electrical power any surplus capacity of the line in excess of the capacity needed for the holder of the right-of-way." 43 C. F. R. 244.44 (d), 17 Fed. Reg. 5903, *infra*, p. 62. The authority of the Secretary of the Interior to

[18] "Project" is defined in Section 3 (11). See also fn. 3, *supra*, p. 7.

establish such conditions was recently upheld in *Idaho Power Co.* v. *Chapman,* decided June 2, 1952 (D. D. C.).

If the decision below is correct, the use of public lands for private transmission lines may be conditioned upon the transmission of Government power, so long as "project" lines under the Federal Power Act are not involved, since the decision of the court below is based upon the particular provisions of that Act. The capriciousness of this situation is illustrated in the instant case where the Company first applied to the Department of the Interior for a permit to construct the lines in question and, after the condition of interconnection was insisted upon, withdrew its application and filed an application with the Federal Power Commission for a license to construct virtually the same transmission lines as part of the project, *supra,* p. 10.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed, and the order of the Commission should be affirmed without modification.

ROBERT L. STERN,
Acting Solicitor General,
HOLMES BALDRIDGE,
Assistant Attorney General,
PHILIP ELMAN,
Special Assistant to the Attorney General,
PAUL A. SWEENEY,
MORTON LIFTIN,
Attorneys.

BRADFORD ROSS,
General Counsel,
WILLARD W. GATCHELL,
Assistant General Counsel,
JOHN C. MASON,
Attorney, Federal Power Commission.

OCTOBER 1952.

APPENDIX

43 U. S. C. 957, 959, 961 provide as follows:

§ 957. RIGHT-OF-WAY TO ELECTRIC-POWER COMPANIES

The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and national forests of the United States by any citizen or association of citizens of the United States for the purposes of generating, manufacturing, or distributing electric power.

§ 959. RIGHTS-OF-WAY FOR ELECTRICAL PLANTS, ETC.

The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest, and other reservations of the United States, and the Yosemite and Sequoia National Parks, and the General Grant grove section of the Kings Canyon National Park, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and tele-

graph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided,* That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further,* That all permits given hereunder for telegraph and telephone purposes shall be subject to the provisions of sections 1–6 and 8 of Title 47, regulating rights of way

for telegraph companies over the public domain: *And provided further,* That any permission given by the Secretary of the Interior under the provisions of this section may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park.

§ 961. RIGHTS-OF-WAY FOR ELECTRICAL POLES AND LINES

The head of the department having jurisdiction over the public lands is authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights of way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands, national forests, and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for telephone and telegraph purposes, to the extent of twenty feet on each side of the center line of such electrical, telephone, and telegraph lines and poles, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right of way herein granted for any one or more of the purposes herein named: *Provided,* That such right of way shall be allowed within or through any national park, national forest, military, In-

dian, or other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: *Provided,* That all or any part of such right of way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for nonuse for a period of two years or for abandonment.

Any citizen, association, or corporation of the United States to whom there was issued, prior to March 4, 1911, a permit for any of the purposes specified herein under any existing law may obtain the benefit of this section upon the same terms and conditions as shall be required of citizens, associations, or corporations thereafter making application under the provisions of this section.

43 C. F. R. 244.14 (17 Fed. Reg. 5899) provides as follows:

§ 244.14. *Approval of right-of-way.* (a) Where an application is complete and in conformity with the law and regulations and all required reports have been obtained and it is determined that the approval of the right-of-way will not be contrary to the public interest, including that of the Government, the manager will approve the right-of-way.

(b) An application which does not conform with the law or regulations under which filed or the approval of which would be inconsistent with the public or Government interest, will be rejected.

43 C. F. R. 244.44 (17 Fed. Reg. 5903) provides as follows:

§ 244.44. *Terms and conditions.* By accepting a right-of-way for a power transmission line, the applicant thereby agrees and consents to comply with and be bound by the following terms and conditions, excepting those which the Secretary may waive in a particular case, in addition to those specified in § 244.9:

(a) To protect in a workmanlike manner, at crossings and at places in proximity to his transmission lines on the right-of-way authorized, in accordance with the rules prescribed in the National Electric Safety Code, all Government and other telephone, telegraph, and power transmission lines from contact, and all highways and railroads from obstruction, and to maintain his transmission lines in such manner as not to menace life or property.

(b) To make provision, or bear the reasonable cost (as may be determined by the Secretary) of making provision for avoiding inductive interference between any project transmission line or other project works constructed, operated, or maintained by him on the approved right-of-

way, and any radio installation, telephone line, or other communication facilities existing when the right-of-way is authorized, or any such installation, line, or facility thereafter constructed and operated by the United States or any agency thereof. This provision shall not relieve him from any responsibility or requirement which may be imposed by other lawful authority for avoiding or eliminating inductive interference.

(c) That the transmission line for which the right-of-way is authorized shall not be used for the transmission of any power generated otherwise than by and at the connecting generating plant until the regional administrator shall have given written authority for such use and then only on the terms and conditions expressed in such written authority.

(d) To allow the Department of the Interior, in the case of a right-of-way applied for on or after October 14, 1948, and covering a right-of-way for an electrical transmission line having a nominal voltage of 33 kv or more, to utilize for the transmission of electrical power any surplus capacity of the line in excess of the capacity needed by the holder of the right-of-way (subsequently referred to in this paragraph as "holder") for the transmission of electrical power in connection with the holder's operations, or to increase the capacity of the line at the Department's

expense and to utilize the increased capacity for the transmission of electrical power. Utilization by the Department of surplus or increased capacity shall be subject to the following terms and conditions:

(1) When the Department desires to utilize surplus capacity thought to exist in a line, notification will be given to the holder, and the holder shall furnish to the Department within 30 days a certificate stating whether the line has any surplus capacity not needed by the holder for the transmission of electrical power in connection with the holder's operations, and, if so, the extent of such surplus capacity.

(2) In order to utilize any surplus capacity certified by the holder to be available, or any increased capacity provided by the Department at its own expense, the Department may interconnect its transmission facilities with the holder's line in a manner conformable to approved standards of practice for the interconnection of transmission circuits. However, for the purpose of diminishing line losses and for other reasons, the Department shall have the option, in lieu of requiring the holder to transmit power, to require that the holder deliver power to customers of the Department from the holder's own generating facilities in exchange for a like amount of power to be delivered by the Department to the holder at points on the holder's line or on his transmission system, to the extent

of the unused capacity of the line for which a right-of-way is granted.

(3) The expense of interconnection will be borne by the Department, and the Department will at all times provide and maintain adequate switching, relaying, and protective equipment so as to insure that the normal and efficient operation of the holder's line will not be impaired.

(4) After any interconnection is completed, the holder shall operate and maintain his line in good condition; and, except in emergencies, shall maintain in a closed position all connections under the holder's control between the holder's line and the interconnecting facilities provided by the Department.

(5) The interconnected power systems of the Department and the holder will be operated in parallel.

(6) The transmission of electrical power by the Department over the holder's line will be effected in such manner and quantity as will not interfere unreasonably with the holder's use and operation of the line in accordance with the holder's normal operating standards, except that the Department shall have the exclusive right to utilize any increased capacity of the line which has been provided at the Department's expense.

(7) The holder will not be obligated to allow the transmission over his line by the Department of electrical power to any per-

son receiving service from the holder on the date of the filing of the application for a right-of-way, other than persons entitled to statutory preference in connection with the distribution and sale of electrical power by the Department.

(8) The Department will pay to the holder an equitable share of the total monthly cost of maintaining and operating the part of the holder's line utilized by the Department for the transmission of electrical power, the payment to be an amount in dollars representing the same proportion of the total monthly operation and maintenance cost of such part of the line as the maximum amount in kilowatts of the power transmitted on a scheduled basis by the Department over the holder's line during the month bears to the total capacity in kilowatts of that part of the line. The total monthly cost may include interest and amortization, in accordance with the system of accounts prescribed by the Federal Power Commission, on the holder's net total investment (exclusive of any investment by the Department) in the part of the line utilized by the Department.

(9) If, at any time subsequent to a certification by the holder that surplus capacity is available for utilization by the Department, the holder needs for the transmission of electrical power in connection with its operations the whole or any part of the capacity of the line theretofore certified as

being surplus to its needs, the holder may modify or revoke the previous certification by giving the Secretary of the Interior 30 months' notice, in advance, of the holder's intention in this respect. After the revocation of a certificate, the Department's utilization of the particular line will be limited to the increased capacity, if any, provided by the Department at its expense.

(10) If, during the existence of the right-of-way, the holder desires reciprocal accommodations for the transmission of electrical power over the interconnecting system of the Department to its line, such reciprocal accommodations will be accorded under terms and conditions similar to those prescribed in this paragraph with respect to the transmission by the Department of electrical power over the holder's line.

(11) The terms and conditions prescribed in this paragraph may be modified at any time by means of a supplemental agreement negotiated between the holder and the Secretary of the Interior or his designee.

U. S. GOVERNMENT PRINTING OFFICE: 1952

Weiser

PAYETTE RIVER

BLACK CANYON DAM (U.S.B.R.)

TO B.P.A. GRID SYSTEM (BONNEVILLE)

BOISE

Boise

BOISE RIVER DAM (U.S.B.R.)

RIVER

SNAKE

Blacks Creek

Thurman

ANDERSON RANCH DAM (U.S.B.R.)

OREGON

IDAHO

I D A H O

Thurman

ANDERSON RANCH DAM (U.S.B.R.)

OREGON

IDAHO

RIVER

Mountain Home

Bliss Plant

Bliss

ORIGINALLY PROPOSED DAM SITE

NOV. 1947 PLAN (EXHIBIT "K")

AUG. 1947 PLAN (EXHIBIT "J")

Hagerman

Clear Lk

Shos

Route on application to Federal Power Commission for Project No. 1975 (Apr. 1949)

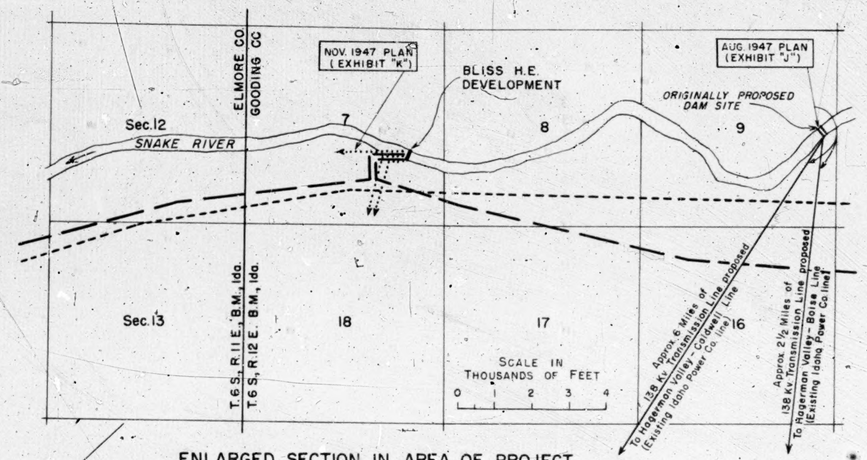
Route on preliminary application for Right-of-Way to Department of the Interior

Aug. 1947 and Nov. 1947 Plans as designated

(Proposed interconnection to Idaho Power Co's. Existing Transmission Lines)

SCALE OF MILES

10 0 10 20



ENLARGED SECTION IN AREA OF PROJECT

BLISS H.E. DEVELOPMENT TRANSMISSION LINES

TO PALISADES PROJECT

TRANSMISSION LINES

TO PALISADES PROJEC

RIVER

AMERICAN FALLS RESERVOIR 1,700,000 AF

Pocatello

Dietrich

Bliss

ORIGINALLY PROPOSED DAM SITE

Hagerman

Minidoka

American Falls

AMERICAN FALLS DAM (Power Plant proposed U.S.B.R.)

MINIDOKA DAM (U.S.B.R.)

LAKE WALCOTT

96,700 AC. FT.

SNAKE

Clear Lk

Shoshone Falls

Twin Falls

224291 O - 52 (Inside back cover)

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
OCT 20 1952

No. 12

In the Supreme Court of the United States

OCTOBER TERM, 1952

FEDERAL POWER COMMISSION, PETITIONER

v.

IDAHO POWER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL POWER COMMISSION

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 12

FEDERAL POWER COMMISSION, PETITIONER

v.

IDAHO POWER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL POWER COMMISSION

In view of the reliance by the Court of Appeals (R. 11) and respondent (Brief, pp. 42–44) upon certain excerpts from the testimony of Mr. Dozier DeVane before the Congressional committees considering the bills which became the Federal Power Act of 1935, it may be helpful to the Court to examine this testimony in the context in which it was given.

I

The Wheeler-Rayburn bill, which was enacted into law on August 26, 1935, was introduced in the Senate and House on February 6, 1935. (S. 1725 and H. R. 5423, 74th Cong., 1st Sess.) Section

202 (a) of the bill, as introduced in Congress, provided in pertinent part as follows:

> SEC. 202 (a). It shall be the duty of every public utility to furnish energy to, exchange energy with, and transmit energy for any person upon reasonable request therefor * * *[1]

Section 202 (a), sometimes described in the hearings as the "common carrier" provision, was eliminated by both the Senate and House committees when they reported the bill on May 13, 1935, and June 24, 1935, respectively. S. Rep. No. 621, 74th Cong., 1st Sess., p. 19; H. Rep. No. 1318, 74th Cong., 1st Sess., pp. 27–28. However, the provision was in the bill in the above-quoted form when Mr. DeVane testified before the House committee on March 9, 12, and 13, 1935, and before the Senate committee on April 19, 1935.

II

Mr. DeVane's testimony before the House committee,[2] so far as pertinent to this case, was as follows:

> The CHAIRMAN [Mr. RAYBURN]. The Committee will come to order.
>
> We have this morning Mr. DeVane, solicitor for the Federal Power Commission,

[1] The bill defined "person" to mean "an individual or a corporation." Section 3 (4).

[2] *Hearings before House Interstate and Foreign Commerce Committee*, 74th Cong., 1st Sess., on H. R. 5423.

who will attempt to explain the provisions of title II of the bill.

Mr. DEVANE. Mr. Chairman and members of the committee, it is my understanding that at the conclusion of the hearing on yesterday your chairman announced that he would like for the hearing this morning to start with an explanation of title II of the bill; first, with an explanation of the amendments to the Federal Water Power Act—or whether he made that announcement himself or not, that is the way I prefer to present it and secondly an explanation of title II of title II. [p. 449]

* * * * *

The CHAIRMAN. All right, you may proceed, Mr. DeVane.

Mr. MAPES. May I ask a question for information?

The CHAIRMAN. Yes.

Mr. MAPES. Until we get down to title II of title II of the bill, the provisions in this bill, in title II, that is in title I of II are amendments to the present Federal Water Power Act?

Mr. DEVANE. That is correct, sir.

Mr. MAPES. And, title II and title III of title II, are they entirely new matters?

Mr. DEVANE. Entirely new matters.

Mr. MAPES. And you are not proposing to amend the licensing section or provisions of the Water Power Act?

Mr. DEVANE. The new matter makes no amendments to the licensing sections of the Water Power Act.

In title III of the present act have been brought forward some of the provisions that are purely administrative in character that now appear in the Federal Water Power Act, and as I read those provisions I will explain how they are handled. [p. 450]

* * * * *

Mr. COOPER. Does the present act provide that one company can connect up with another's gas line?

Mr. DEVANE. You are talking about the new part of it? You are talking about title II of title II?

Mr. COOPER. This is in title I.

Mr. DEVANE. Title I?

Mr. COOPER. Title I. When you get to title II, I would like to ask some questions.

Mr. DEVANE. This is title II. We are talking about the Federal Water Power Act. [p. 477]

* * * * *

Mr. COOPER. I may as well ask my question, what I was going to ask, because it is bearing right on the thing that has been discussed here.

You will have to excuse me, if I am not clear, because I am not a lawyer. But, if you grant a license to the State or municipality, under title II, have you got the same regulatory power over that State or municipality that you have over a private company?

Mr. DEVANE. As to rates and supervision, and so forth.

Mr. COOPER. Yes.

Mr. DEVANE. We have the power that is given us by sections 19 and 20 of the Federal Water Power Act; yes, sir.

Mr. COOPER. Well, the powers are very broad in respect to regulating a private corporation.

Mr. DEVANE. Well now, the powers——

The CHAIRMAN. Let us have order, please. Even the Chair cannot hear what is being said.

Mr. DEVANE. The powers given under title II of title II has no application to that case, if that is what you have in mind.

The power over interstate rates is given under title II of title II. Now, title II, I am going to discuss in a little while, has no application whatever to municipalities, if that is the matter you are asking about.

Mr. COOPER. Why not?

Mr. DEVANE. Because it is so drawn as not to have any application.

Mr. COOPER. Well, why?

Mr. DEVANE. Why is it so drawn as not to have any application to it?

Mr. COOPER. Yes.

Mr. DEVANE. Because in the preparation of this bill it was our judgment that the regulatory provisions as we proposed them should not extend to municipalities or Government projects.

Mr. COOPER. Well, now, I asked a question yesterday of the Commissioner if,

under this bill, the Commission had the power to supervise and regulate the T. V. A.

Mr. DEVANE. Yes.

Mr. COOPER. And he frankly stated no.

Mr. DEVAN. Yes.

Mr. COOPER. Now, you come here this morning and say that you have no power to regulate municipalities or States.

Mr. DEVANE. Or the Tennessee Valley Authority.

Mr. COOPER. Or the Tennessee Valley Authority.

Mr. DEVANE. That is right.

Mr. COOPER. Well, if you are going to apply all of these regulations and supervisions to the operation of private companies, what chance have they got to compete against municipalities, or States, or the Federal Government? Is that fair?

Mr. DEVANE. Well now, of course, I would rather not discuss it at this time, if I may reserve to a later time discussion as to whether or not that is fair, because I think——

Mr. COOPER. Will you answer why they should not come under supervision?

Mr. DEVANE. Why they should not come under the supervision?

Mr. COOPER. Yes.

Mr. DEVANE. Insofar as municipalities are concerned, they have never been, and we do not see any reason why we should ask Congress to give the Federal Power

Commission jurisdiction over their properties.

Mr. COOPER. Well, if they engage in interstate commerce.

Mr. DEVANE. They are a governmental agency of a nature and a class, and we see no reason why we should ask Congress to extend our power over them.

There is also, of course, the question as to whether or not in that respect Congress would have the power.

Now, you have the power over licensees, because there you have the complete control of the subject matter, and you can say to a State or a city, or anybody else, "Keep off these navigable waters," or, "Come on them under certain conditions," but insofar as the power to regulate the charges, I know of no instance where Congress has ever done that, and while I have not given the question any consideration, I seriously doubt the power of Congress to regulate these municipalities. It has the power to regulate them insofar as the Federal water power is concerned, and the Water Power Act is concerned, and that power is not being touched by this proposed law. [pp. 478–480]

* * * * *

Mr. DEVANE. Now, with that, unless there are some questions in connection with the other amendments to the act, I will be glad to pass to title II of title II of this bill.

The CHAIRMAN. All right, go ahead. [pp. 490–491]

* * * * *

Mr. DEVANE. Now, passing from the question of rates, we go to the question of jurisdiction over facilities and over securities, and over acquisitions and sales of property.

Those sections in the act may be considered together without dealing with them separately in detail.

The Commission is given under section 202 and section 203 of the bill the duty of attempting to bring these systems into district and integrated systems, the purpose being to provide the best and cheapest service that can be provided for the public. If that is to be accomplished. and to my mind, that is the most important part of this bill, the provision that authorizes the Commission to compel interconnections between these systems, and make the power available where it is needed—I say if that is to be accomplished, then, this Commission must have certain jurisdiction over facilities and jurisdiction over acquisition of property, and jursdiction over securities. [p. 501]

* * * * *

Mr. WOLVERTON. I would like to ask a question. It is prompted by the questions asked by Mr. Cooper yesterday. I would have liked to follow his questions and your answers at that time, but unfortunately I was unable to do so.

You stated in answer to a question of Mr. Cooper, that we will hear presented before this hearing is concluded, the same objections as were used when legislation was presented for regulation of railroads by the Interstate Commerce Act, and the regulation of the telephone and telegraph companies.

Do you think that such legislation is comparable to that presented in this bill?

Mr. DEVANE. You mean, do I think the legislation, insofar as it affects those companies, is comparable to this legislation, insofar as it affects the power companies?

Mr. WOLVERTON. Yes.

Mr. DEVANE. Mr. Wolverton, I think the legislation we are proposing here, insofar as this industry is concerned, is the best piece of legislation that has ever been proposed as a regulatory measure. I think it is far better than the Interstate Commerce Act. I think it is better than the Communications Act, and I am going to try to tell you why, before I get through, if I am permitted to do so. [pp. 512–513.]

* * * * *

Mr. WOLVERTON. Under the provisions of this bill, would it be possible for the Government in any of its electric operations to utilize the transmission lines of private companies?

Mr. DEVANE. No, sir; and I want to make that very definite; and if there is any

doubt about it, so far as I am concerned, such amendment might be made as to make it clear. We have attempted in this bill, Mr. Wolverton, to accomplish these two purposes: One is not to supersede, but aid State regulation; and insofar as rates are concerned, to deal only with rates that State Commissions cannot regulate.

We have, insofar as State, municipal, or Government projects are concerned, excluded them from the jurisdiction of the Commission or from coming under this act. We have been earnest and honest in our effort to accomplish this result. We think we have done it. If we have not and it is the desire of Congress not to bring Government projects under the jurisdiction of the Commission, or give the municipal or governmental projects the right to use the transmission lines of private industry—and we have not succeeded in making that clear in this bill—an amendment should be proposed that will do it better. It will receive our hearty endorsement.

Mr. WOLVERTON. Let me suggest a possible situation. Your answer will clarify my mind considerably as to the effect of this bill in the particular instance: Assume that a municipality built a plant for the generation and distribution of electric energy; assume that a distant community is serviced by a company that comes under the regulation of this bill in that it procures its electric energy from outside of the State. Could the city which has con-

structed a plant, but has no transmission lines, utilize the system of transmission lines constructed by the private company?

Mr. DEVANE. No, sir.

Mr. WOLVERTON. Then, you do not think that the power given in this bill to the Federal Power Commission would enable it to direct that those transmission lines be so used?

Mr. DEVANE. Mr. Wolverton, my answer to that is this: That if there is any doubt about it and this committee can remove that doubt by additional words in this bill, let us put them in.

Mr. WOLVERTON. I do not think that anybody could be more anxious to be fair.

Yesterday you suggested an amendment with respect to rates that cleared up a situation which was not clear until you offered the amendment; and your willingness to suggest an amendment of that kind, if the committee deems it necessary, indicates your sincere effort to have no doubt as to the meaning of the language used.

Mr. DEVANE. I am sincere in all I say to you in connection with that matter. We are not attempting to get control in any manner of municipal, State, or Federal projects, or the energy produced by those projects. That is the Commission's position. The chairman of the Commission just stated to me that I could announce that is the Commission's position in this matter.

Mr. WOLVERTON. May I ask, did you participate in the drawing of this bill?

Mr. DEVANE. Of title II of title II?

Mr. WOLVERTON. Yes.

Mr. DEVANE. Yes, sir; I participated in it, in making suggestions. I worked on it some; yes, sir. [pp. 514–515]

* * * * *

Mr. MAPES. Would the common-carrier provision of the bill work principally to the advantage of municipally owned and governmentally-owned projects, or to the advantage of privately owned projects?

Mr. DEVANE. The common-carrier principle that is contained in this bill is intended for the private plant insofar as compulsion is concerned.

Mr. MAPES. Is it the purpose to compel the privately owned transmission companies to carry the energy of municipal projects as well as private projects?

Mr. DEVANE. No, sir; I thought I had made that very clear. If I did not, I want to make it very clear now. It is not intended to give the Commission power to require the private lines to take on any power generated by municipal plants or by any Government plant.

Now, that is a policy for Congress to determine; but so far as the Federal Power Commission is concerned, it is not asking or seeking that authority, and this bill does not propose to give the Commission any jurisdiction over that kind of a case.

RIDER (13

MR. LEA. Has there been any consideration of the question as to whether or not the regulation of rates, both of Government and private concerns, should be unified in one body?

MR. DeVANE. No, sir; not on my part, and not on the part of the Commission insofar as I know.

The activities of the other Governmental agencies are matters that belong entirely to Congress and as I explained when the question was up before, we felt that we had no right to come here and ask to be given power over another governmental agency created by Congress.

MR. LEA. Yes. I can realize the attitude of your Commission in that respect, because it would not be for them to ask for that. From the standpoint of policy of Congress, I was interested to know whether that problem has been considered.

MR. DeVANE. No, sir; not so far as my work with the Commission is concerned; it has never been a matter of consideration or discussion. The only thing that we have discussed is the desirability of making it perfectly clear in this law that it is not the intention of this law to reach out and get control of that power nor is it the intention of this law to authorize this Commission to require the transmission of that power on the lines of these private operating companies. (p. 559)

Mr. MAPES. The Commission does not propose it; and in your opinion the bill does not allow it?

Mr. DEVANE. The bill does not, and if there is any doubt about it, the bill should be amended in that respect, and I have promised to try to draw other language that will accomplish it. [p. 546]

* * * * *

III

Mr. DeVane's testimony before the Senate committee,[3] so far as pertinent, was as follows:

The CHAIRMAN [Senator WHEELER]. All right. Mr. DeVane, do you have a statement prepared that you wish to make to the committee?

Mr. DEVANE. I am here, Mr. Chairman, to discuss title II of the Wheeler bill, S. 1725.

The CHAIRMAN. Will you please speak up loud enough so that everyone in the room may hear you?

Mr. DEVANE. Mr. Corcoran explained to you yesterday how title I was prepared and its purpose. He also made reference to the fact that title II of the bill was prepared by the Federal Power Commission, and as Solicitor for that Commission I participated in the preparation of title II of the bill.

The CHAIRMAN. You may proceed.

---

[3] *Hearings before Senate Committee on Interstate Commerce*, 74th Cong., 1st Sess., on S. 1725.

Senator WHITE. Let me ask you right there: At what page of the bill does title II begin?

Mr. DEVANE. It begins on page 78 of the Wheeler bill. The title II that I referred to, however, begins on page 104 with section 201. On page 78 of the bill there is proposed certain amendments to certain sections of the Federal Water Power Act. Section 212, on page 104, provides that sections 1 to 29, inclusive, of the Federal Water Power Act, as amended, shall constitute title I of that act. And section 213, on page 104 of this bill, provides that the Federal Water Power Act, as amended, shall be further amended by adding thereto titles II and III.

I mention this so that there may be no confusion as to the reason for the two separate designations of title II, on pages 78 and 104 of the bill.

The second title II, beginning at page 104 of the bill, provides for the regulation of the transmission and sale of electric energy in interstate commerce. [pp. 223-224]

* * * * *

Mr. DEVANE. I might say in connection with the proposed amendments to the Federal Water Power Act——

Senator HASTINGS (interposing). Is that the second title II?

Mr. DEVANE. That is title II, beginning at page 78 of the bill.

Senator HASTINGS. Are they proposed as amendments to the Water Power Act?

Mr. DEVANE. Yes, sir. Beginning on page 78 of the bill are proposed amendments to the Federal Water Power Act. And these proposed amendments go from page 78 to page 104 of the bill. These amendments are, perhaps I might say, self-explanatory; they are the result of the experience of the Federal Power Commission in the administration of the act.

Senator WHITE. May I ask you a question right there?

Mr. DEVANE. Certainly.

Senator WHITE. Are these proposed amendments to this title II necessary in order to make effective title I of the bill, or are they just something additional and distinct from the proposals contained in title I of the bill?

Mr. DEVANE. They have no relation either to title I of the bill or to the second title II. What I mean by the——

Senator WHITE (interposing). Then this is a sort of omnibus bill?

Mr. DEVANE. What I mean by that is this: That the amendments of the Federal Water Power Act are offered as amendments that should be made to that act without regard to what is done with title I or the second title II of the bill. [pp. 232–233]

* * * * *

Mr. DEVANE. I wish also to make it clear at the outset that title II of this bill is

applicable to the private utilities only. There was a typographical error in section 201 in the House bill, which indicated that the power over rates might extend further than we stated that it was the purpose of the legislation to go. Section 201 of this bill is clear on this subject. The error was not committed in this copy, so this is all right.

The CHAIRMAN. The Senate generally makes fewer mistakes than the House.

Senator HASTINGS. You mean it does not apply to a publicly owned power plant?

Mr. DEVANE. It does not apply to a publicly owned power plant.

Senator HASTINGS. Although it transmits its power across State lines?

Mr. DEVANE. Although it transmits its power across State lines.

Senator HASTINGS. Why is that?

Mr. DEVANE. Because it has not been drawn to include public plants.

Senator HASTINGS. Why was it not drawn that way?

Mr. DEVANE. We did not feel that it was within our province to prepare a bill that would undertake to regulate municipal, State, or Government utilities. [pp. 255–256]

* * * * *

Senator HASTINGS. Do you undertake to regulate the power created by the Tennessee Valley Authority?

Mr. DEVANE. No, sir.

Senator HASTINGS. Why is not that done?

Mr. DEVANE. Insofar as all governmental projects are concerned, our approach to the matter was that in the legislation creating those authorities and giving those authorities their powers, this Congress had provided the power that it wanted those agencies to have, and it did not seem to us that it was proper to attempt to bring those other governmental agencies under the regulation of the Federal Power Commission; so that in our preparation of this bill we have left them out, and they are outside the pale of this bill.

Senator BARKLEY. On the theory that it is not necessary for the Government to regulate itself?

Mr. DEVANE. That is right.

Senator HASTINGS. I am not at all certain that that theory is correct.

Mr. DEVANE. The industry will probably appear before you and say that the Federal Power Commission is given the power under this bill to make the private utilities take Government power from these projects—that we have the authority to require physical connection and to make them purchase power. I just want to make it clear before they start on that that the bill itself does not give the Commission that authority, and our intention in the preparation of the bill was not to give the Commission that authority. If there is any doubt about

it, a clarifying amendment should be put in if it is the view of the Congress that the authority should not be given. But it is not the intention of this bill to do that. [pp. 256–257]

* * * * *

Mr. DEVANE. I would like to enumerate the several objectives of the bill. They are as follows:

(1) Jurisdiction over all electric utilities engaged in interstate commerce and over the wholesale rates of such utilities.

(2) Authority to establish regional districts for the control of the production and transmission of electric energy. The bill provides for voluntary coordination under the supervision and direction of the Commission of the privately- and publicly-owned electric facilities in the several districts and as to the privately-owned facilities, the Commission is given authority to require physical connection and the purchase, sale or interchange of power.

(3) The Commission is given control over additions, betterments, and abandonments of interstate transmission lines and of generating facilities used in connection with such lines. No jurisdiction is given to the Commission over transmission lines used in intrastate commerce or over distribution facilities or generation facilities that are used exclusively for intrastate commerce. [pp. 257–258]

* * * * *

Senator HASTINGS. May I inquire what is there about this title II that the industry does object to?

Mr. DEVANE. I can tell you what they tell us they object to. I think title II, from their standpoint, is important, and they may look upon it as serious regulation. They object very much to section 202 (a), which makes their lines common carriers. They object very seriously to any authority that would make them purchase or transport power from a public project, which is not in the bill but to which they devoted a great deal of their time at the House hearings. Those, as I recall, are the two chief attacks that they made on title II.

The CHAIRMAN. Let me understand you. You say that there is nothing in the bill which compels them to transport power of a public project over their lines. Am I correct in that?

Mr. DEVANE. That is right, sir.

The CHAIRMAN. So that there is no use of their wasting any time with reference to that phase of it; and if you are agreed with them with reference to it, it seems to me that if it is not clear, if they have an amendment which will cover that, that would end it. [p. 260]

* * * * *

Mr. DEVANE. I should like to address myself to just a few of the specific sections of title II. First, I would like to refer to section 202–A, on page 105 of the bill. That section introduces into this bill what

is generally referred to as the common-carrier principle. That is, it would not only authorize the Commission to require interconnection between these systems, but would likewise authorize the Commission to make a utility transport energy for another utility.

A very serious objection has been made to that provision by the industry. The objection, however, is made on the ground that the bill authorizes the Commission to require these private systems to transport Government power, and they have used that section as the basis for their claim that this is a bill to nationalize the industry and is merely the first step in Government ownership. I do not know what their claim will be here before this committee, but they have had a great deal to say about that before the House committee.

Senator MINTON. Are you still talking about section 202–A?

Mr. DEVANE. Yes. [pp. 270–271]

* * * * *

IV

The Senate committee reported favorably on the bill (S. 1725) on May 13, 1935, but in view of the extensive amendments proposed, the committee thought it advisable to report a substitute bill (S. 2796). S. Rep. No. 621, 74th Cong., 1st Sess., p. 1. The committee report (p. 19) made the following comments on Section 202 (a):

Section 202 (a) of S. 1725 imposed upon each public utility the duty to furnish energy to, exchange energy with and transmit energy for any person upon reasonable request. This provision has been eliminated, and the other subsections of the old section 202 which relate to rates have been removed to the general rate section (sec. 205). While imposition of these duties may ultimately be found to be desirable, the committee does not think that they should be included in this first exercise of Federal power over electric companies. It relies upon the provision for the voluntary coordination of electric facilities in regional districts contained in the new section 202 (a) (formerly sec. 203 (a)) for the first Federal effort in this direction. The authority to compel utilities to establish physical connection with the facilities of other companies and to sell and exchange energy, now contained in section 202 (b), has been limited to cases instituted by complaint of a State commission or a public utility and to cases in which both parties to the order are interstate utilities.

In addition, the committee proposed a new provision, Section 201 (e), which as finally enacted became Section 201 (f). That provision reads:

> No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing * * *.

The committee report stated with respect to this provision:

> A new subsection (e) has been added to remove all doubt that the act is not to apply to public projects, Federal, State or municipal. Despite repeated assurances by representatives of the Federal Power Commission that no such authority was intended, the charge was frequently made that the bill as originally introduced authorized the Commission to compel private utilities to establish connection or exchange power with public plants. This new subsection carries out in unmistakable terms the original intention of the bill in this respect. [p. 19]
>
> * * * * *
>
> Subsection (e) expressly excludes from the operation of the act the United States, the States, municipalities, and all of their agencies. It is designed to make perfectly clear that no compulsory powers may be exerted upon public projects or upon privately owned projects for the benefit of public plants. [p. 49]
>
> * * * * *

The same amendments were proposed, with similar comments, in the House report. H. Rep. No. 1318, 74th Cong., 1st Sess., pp. 27–28.

V

The House and Senate committee reports state the following with respect to the amendments

to the Federal Water Power Act contained in "Title I of Title II" of the bill (which was later redesignated "Part I" of the Act):

> The amendments to the present Federal Water Power Act have been requested by the Federal Power Commission on the basis of its experience in the administration of that Act. Most of them are designed merely to clarify the Act in its application to situations that have arisen in its administration. [Sen. Rep. No. 621, 74th Cong., 1st sess., p. 17]
>
> * * * * *
>
> The amendments to the present Federal Water Power Act are all minor. They have been requested by the Federal Power Commission, largely for the purpose of clarifying the Act in its application to situations that have arisen in its administration, and also to strengthen it in certain particulars. [H. Rep. No. 1318, 74th Cong., 1st sess., p. 7]

Respectfully submitted.

ROBERT L. STERN,
Acting Solicitor General.
PHILIP ELMAN,
Special Assistant to the Attorney General.
BRADFORD ROSS,
General Counsel,
Federal Power Commission.

OCTOBER 1952.

U. S. GOVERNMENT PRINTING OFFICE: 1952

Office - Supreme Court, U. S.
FILED
FEB 20 1952
CHARLES ELMORE CROPLEY
CLERK

LIBRARY
SUPREME COURT, U. S.

No. 12

IN THE

Supreme Court of the United States

October Term, 1951

FEDERAL POWER COMMISSION, *Petitioner*

v.

IDAHO POWER COMPANY

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR IDAHO POWER COMPANY IN OPPOSITION

A. C. INMAN
1220 Idaho Street
Boise, Idaho

LOUIS E. CHARNLEY, JR.
Reid & Priest
910 17th St., N. W.
Washington 6, D. C.
Of Counsel

HARRY A. POTH, JR.
Reid & Priest
910 17th St., N. W.
Washington 6, D. C.
Counsel for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	5
Statute Involved	6
Statement	6
Summary of Argument	9
Argument:	
I. Only One Question Is Reached for Determination on the Facts of This Case—the Authority of the Federal Power Commission Under the Act to Impose the Conditions Complained Of	11
II. The Merits of the Public Power Program and the Authority of the Secretary of the Interior Under Other Statutes Are Not at Issue Here	19
III. The Decision Below Is Clearly Correct	22
Conclusion	25
Appendix A	26

CITATIONS.

CASES:

Addison v. *Holly Hill Co.*, 322 U.S. 607	17
Alberty v. *Federal Trade Commission*, 182 F. 2d 36	18
Belmont Laboratories v. *Federal Trade Commission*, 103 F. 2d 538	19
Bowman v. *Loperena*, 311 U.S. 262	4
Colgate-Palmolive Peet Co. v. *National Labor Relations Board*, 338 U.S. 355	11, 25
Commissioner v. *Bedford's Estate*, 325 U.S. 283	5
Denholm & McKay Co. v. *Commissioner of Internal Revenue*, 132 F. 2d 243	2
Department of Banking v. *Pink*, 317 U.S. 264	2, 3

Page

Educators Ass'n. v. *Federal Trade Commission*, 108 F. 2d 470 19
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U.S. 134 17
Federal Power Commission v. *Panhandle Eastern Pipeline Co.*, 337 U.S. 498 21
Federal Trade Commission v. *Bunte Bros.*, 312 U.S. 349 21
Federal Trade Commission v. *Morton Salt Co.*, 334 U.S. 37 17
Federal Trade Commission v. *Royal Milling Co.*, 288 U.S. 212 17
Ford Motor Co. v. *National Labor Relations Board*, 305 U.S. 364 17
General American Tank Car Corporation v. *El Dorado Terminal Co.*, 308 U.S. 422 16
Gimbel Bros. v. *Federal Trade Commission*, 116 F. 2d 578 18
Gypsy Oil Co. v. *Escoe*, 275 U.S. 498 4
Idaho Power Company v. *Oscar L. Chapman* (D.C. Dist., Civil Action No. 4540-50) 11, 19
Jusino v. *Morales & Tio*, 139 F. 2d 946 5
Leishman v. *Associated Wholesale Electric Co.*, 318 U.S. 203 2
Lynch v. *People of New York ex rel. Pierson*, 293 U.S. 52 5
Mayflower Hotel Stockholders Protective Committee v. *The Mayflower Hotel Corporation*, — F. 2d — (D. C. Cir., No. 10745, November 29, 1951) 4
Memphis Natural Gas Co. v. *Beeler*, 315 U.S. 649 5
Morrill v. *Jones*, 106 U.S. 466 20
Morse v. *United States*, 270 U.S. 151 4
National Labor Relations Board v. *U. S. Truck Co.*, 124 F. 2d 887 19
Nealon v. *Hill*, 149 F. 2d 883 5
Pfister v. *Northern Illinois Finance Corporation*, 317 U.S. 144 4
Safe Harbor Water Power Corp. v. *Federal Power Commission*, 179 F. 2d 179 25
Safeway Stores v. *Coe*, 136 F. 2d 771 5
St. Louis, Brownsville & Mexico Ry. Co. v. *Brownsville Navigation District*, 304 U.S. 295 16

Page

Siegel Co. v. *Federal Trade Commission*, 327 U.S. 608 17
Southern Ry. Co. v. *Tift*, 206 U.S. 428 16
Texas & Pac. Ry. Co. v. *Abilene Cotton Oil Co.*, 204 U.S. 426 16
United States v. *Idaho Power Co.*, 85 F. Supp. 913 .. 8
United States v. *Seminole Nation*, 299 U.S. 417 3
Zimmern v. *United States*, 298 U.S. 167 2

UNITED STATES STATUTES:

Act of March 4, 1911, c. 238, 36 Stat. 1253, 43 U.S.C. 961 ..... 11, 19
Act of May 29, 1928, c. 918, 45 Stat. 1011 20
Act of August 21, 1935, c. 599, 49 Stat. 687 24
Communications Act of 1934, 48 Stat. 926, 47 U.S.C. § 402(e) 18
Federal Power Act, 49 Stat. 863, 16 U.S.C. § 791a *et seq.*

Sec. 3(5) 6
Sec. 3(11) 7
Sec. 4(e) 6, 15
Sec. 10(a) 7, 10, 14
Sec. 10(g) 24
Sec. 201(e) 6
Sec. 201(f) 20, 23
Sec. 313(b) 2, 6, 10, 18
Sec. 320 25

Mineral Leasing Act, 41 Stat. 449, 30 U.S.C. § 185 .. 24
Public Utility Act of 1935, Title II, 49 Stat. 838, 16 U.S.C. § 791(a) *et seq.* 24, 25
Reclamation Act of June 17, 1902, 32 Stat. 388, 43 U.S.C. § 391 *et seq.* 16
28 U.S.C. § 452 5
28 U.S.C. § 1254(1) 2
28 U.S.C. § 2101(c) 2

Page

MISCELLANEOUS:

Thirtieth Annual Report of the Federal Power Commission (1950) 13, 14

Pp. 161-183 14
P. 162 13
P. 171 13
P. 174 13
P. 194 14

43 CFR § 245.9 8
43 CFR § 245.21 ..... 8, 14, 19, 21
58 Congressional Record, 66th Cong., 1st Sess. 23
Regulations of the Department of the Interior, 13 Federal Register 6214 ..... 8, 13
Regulations of the Department of the Interior, 14 Federal Register 4620 ..... 8, 13
H.R. 3184, 66th Cong., 1st Sess. 22, 23
H.R. 5423, 74th Cong., 1st Sess. 22
Hearings before House Committee on Interstate Commerce on H.R. 5423, 74th Cong., 1st Sess. 22, 23
S. 1725, 74th Cong., 1st Sess. 22
Senate Report No. 621 to accompany S. 2796, 74th Cong., 1st Sess. 22, 24

In The

Supreme Court of the United States

October Term, 1951

No. 483

Federal Power Commission, *Petitioner*

v.

Idaho Power Company

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR IDAHO POWER COMPANY IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 65-73) is reported at 189 F. 2d 665.[1]

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on May 10, 1951. Acting upon Petitioner's Motion "For Clarification" of opinion and judgment, filed thereafter on July 16 (R. 74-5), the Court of Appeals on September 21 modified such opinion and judgment (R.

[1] "R" refers to the printed Joint Appendix; "Tr." refers to the original record on file with the Clerk.

76-7). By subsequent order, dated September 24, the certified copies of the opinion and judgment were recalled, and the Clerk of the Court of Appeals was directed to issue to Petitioner certified copies of the opinion and judgment as so modified (R. 77). Such certified copies also bear the original date and filing date of May 10, 1951.

The jurisdiction of this Court is invoked under Section 313(b) of the Federal Power Act and 28 U.S.C. §1254(1), but Petitioner is barred by reason of its failure to file a timely petition for certiorari under 28 U.S.C. §2101(c).

Upon Petitioner's motion, the time for filing a petition for certiorari in this case, which otherwise would have expired on August 8, was extended for 59 days to October 6, by order of the Chief Justice on August 2 (R. 79). No further extension of the time to apply for certiorari was, or could have been, granted under 28 U.S.C. §2101(c). The Petition herein was filed on December 19, 1951, long after such extension of time had expired, and this Court is therefore without jurisdiction to entertain such Petition, unless a new period of 90 days commenced to run from September 21, 1951, the date on which the Court of Appeals modified its opinion and judgment of May 10.

A *timely* petition for rehearing tolls the running of a statutory limitation on the time to seek review since it operates to deprive a judgment of the finality which is essential to appealability. *Denholm & McKay Co.* v. *Commissioner of Internal Revenue*, 132 F. 2d 243, 247 (1st Cir. 1942). But this doctrine is only applicable where such petition seeks a "reconsideration of . . . basic findings . . . and the alteration of the conclusions of the court," so that if granted, "rights already adjudicated [will] be altered." *Leishman* v. *Associated Wholesale Electric Co.*, 318 U.S. 203, 205 (1943); *Cf. Zimmern* v. *United States*, 298 U.S. 167 (1936). Thus, it is well established that the re-entry of a final judgment with only formal changes not affecting any matter adjudicated does not enlarge the time to seek review. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942).

Petitioner's Motion for Clarification was filed on July 16, 1951, 67 days after entry of the opinion and judgment and 52 days after expiration of the time for filing a petition for rehearing (Rule 26 of the General Rules of the U.S. Court of Appeals for the District of Columbia Circuit). Enlargement of the 15-day period within which to file petitions for rehearing can only be granted, after the expiration of such period, "for cause shown . . . where the failure to act was the result of excusable neglect", *id.* Rule 32(b). Petitioner's Motion did not set forth any "cause" for late filing, and since the Court's Order of September 21, 1951, is similarly devoid of any finding of "excusable neglect," it is apparent that neither the Court nor Petitioner considered the Motion to be a petition for rehearing authorized by Rule 26.[2] Cf. *United States* v. *Seminole Nation*, 299 U.S. 417, 420-21 (1937).

Moreover, the Motion did not request reargument or reconsideration by the Court of any substantive issue previously adjudicated. No error in the Court's conclusions of law was alleged, and no modification of any such conclusion was proposed. The Court was merely asked to *clarify*, or *restate in different language*, what it had already decided.[3]

It follows, therefore, that the Court's purely formal action in rewording the language of a portion of its opinion

---

[2] Petitioner's failure to file 40 printed copies of its Motion for Clarification in the Court of Appeals, as required by Rule 26, constitutes further evidence that it did not consider such Motion a petition for rehearing.

[3] Here, as in *Department of Banking* v. *Pink*, 317 U.S. 264, 266, *supra*:

"... the motion did not seek a reargument or rehearing of any part of the case; *it was no more than a request that the Court of Appeals declare what had in fact occurred upon its previous decision of the case* . . .*

"... Unlike a motion for reargument or rehearing, it did not seek to have the Court of Appeals reconsider any question decided in the case. The final judgment already rendered was not challenged . . ."

"Here no such alteration of the rights adjudicated was asked, and the finality of the court's first order was never suspended."

* Emphasis supplied throughout unless otherwise indicated.

and judgment did not operate to enlarge the time for filing a petition for certiorari in the instant case.

Even if the Motion were a "motion for reargument or rehearing" seeking "an alteration of the *rights* adjudicated,"[4] such Motion was untimely under the Court of Appeals Rule 26. Unlike a *timely* petition for rehearing, the filing of an *untimely* petition for rehearing does not enlarge the time for appeal, unless it is "entertained" by the court on its merits. *Pfister* v. *Northern Illinois Finance Corporation*, 317 U.S. 144 (1942); *Bowman* v. *Loperena*, 311 U.S. 262 (1940); *Gypsy Oil Co.* v. *Escoe*, 275 U.S. 498 (1927); *Morse* v. *United States*, 270 U.S. 151 (1926). The mere denial of such a petition, or even a consideration of whether the petition states grounds for the court to reconsider its prior conclusions, does not constitute "entertainment". Whether a petition was "entertained or considered on its merits . . . depend[s] upon what the order showed the court did," *Pfister* v. *Northern Illinois Finance Corporation, supra*, at p. 151.

Here the Court of Appeals, without opinion, merely amended the opinion and judgment *as of May 10, 1951* (like the original, the amended judgment bears the Clerk of the Court's stamp "Filed May 10, 1951"), entirely contrary to its normal practice in disposing of petitions for rehearing to enter an entirely new opinion and judgment, where modifications of substance have been ordered upon a reconsideration on the merits. See *Mayflower Hotel Stockholders Protective Committee* v. *The Mayflower Hotel Corporation*, ____ F. 2d ____ (D.C. Cir., No. 10745, November 29, 1951); where the court, presented with a matter of substance on a Motion for Clarification, dismissed the motion and, *sua sponte*, ordered a rehearing on the merits. Further, there is nothing in the record to indicate that the Court of Appeals ever reconsidered, as a proposition of law, its power to modify, and affirm as modified, Petitioner's original order. It therefore appears that Petitioner's Motion

[4] 317 U.S. 264, 266.

for Clarification, if it sought a readjudication on the merits, was never "entertained".[5] Thus, Petitioner has not sustained the burden of showing "affirmatively" that this Court has jurisdiction, *Memphis Natural Gas Co.* v. *Beeler*, 315 U.S. 649, 651 (1942) and *Lynch* v. *People of New York ex rel. Pierson*, 293 U.S. 52 (1934).

Here, Petitioner had 149 days to decide whether it would apply for certiorari. Hence, it can hardly be claimed that an additional period of 90 days was necessary to enable the "unsuccessful litigant to determine whether to seek further review," *Commissioner* v. *Bedford's Estate*, 325 U.S. 283, 288 (1945). For the foregoing reasons it is respectfully prayed that this Court deny the Petition herein for lack of jurisdiction.

QUESTION PRESENTED

Basically only a single question is presented by the Petition:

> Whether the action of Petitioner in requiring Respondent to agree—as a condition to a license under the Federal Power Act for a hydro-electric project—to permit various agencies of the Department of Interior to use the transmission lines, constituting a part of such project, for the transmission of Government power in competition with the Respondent, exceeds the authority granted by such Act, is arbitrary and unreasonable, and constitutes a taking of Respondent's property without due process of law.

---

[5] In fact, it is highly doubtful whether, in the absence of the finding of "excusable neglect" required by the Court's Rule 32(b), the Court could have "entertained" the Motion. *Safeway Stores* v. *Coe*, 136 F. 2d 771 (D.C. Cir. 1943); *Jusino* v. *Morales & Tio*, 139 F. 2d 946 (1st Cir. 1944); *Nealon* v. *Hill*, 149 F. 2d 883 (9th Cir. 1945) *cert. denied*, 326 U.S. 753 (1945). The policy of these decisions—that limitations on the time for requesting relief authorized by rules of court must be strictly observed—is of particular significance today since the abolition of the "term of court" doctrine with respect to the finality of judgments, 62 Stat. 907 (1948), 28 USC §452 (1950 Supp.).

The additional question posed by the Petitioner of purported judicial usurpation of administrative discretion, in striking the offending conditions from the Federal Power Commission's order and affirming such order as so modified, is not reached for determination upon the facts in this case.

It is pointed out, however, that the action of the Court below, in modifying and affirming the Commission's order, was in strict accordance with its statutory power and jurisdiction under Section 313(b) of the Federal Power Act, which provides that "such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part."

STATUTE INVOLVED

The pertinent provisions of the only statute involved, the Federal Power Act (49 Stat. 863, 16 USC §791a *et seq.*), are contained in a pamphlet copy of such Act submitted with the Petition.

STATEMENT

Idaho Power Company is a Maine corporation, operating as a public utility in the States of Idaho, Oregon and Nevada, and is an electric "public utility" and a "licensee" as those terms are defined in the Act (Sections 201(e) and 3(5)). The Federal Power Commission is the administrative body entrusted with the administration of the Federal Power Act.

On August 22, 1947, the Company filed with the Commission an application, pursuant to Section 4(e) of the Act, for a license for the purpose of constructing, operating and maintaining a hydroelectric project on the Snake River in south central Idaho occupying, in part, lands of the United States (R. 12). Such project included a dam, power plant and *"transmission lines connecting with applicant's 138-kilovolt transmission system"* (*id.*). Such transmission lines, transmitting power from the power plant to the point

of junction with the Company's interconnected primary transmission system, are, under the definition contained in Section 3(11) of the Act, an essential and a required part of all licensed projects. The entire development was to be known as the Bliss Project, and was by the Commission designated as "Project No. 1975".

Construction of the dam and power plant was begun, upon pre-license consent of the Commission (R. 17), and on March 2, 1948, the Commission entered its Order (R. 12) authorizing the issuance of a major license for the Project, and reserving for determination "at a later date the question of what transmission facilities should be included in the license as part of the complete project" (R. 13). Such Order included the essential finding under Section 10(a) of the Act, that "Under present circumstances and conditions and upon the terms hereinafter imposed, the project is best adapted to a comprehensive plan for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes" (R. 13).

On April 20, 1949, the Company filed with the Commission its supplementary application (R. 17) to include as a part of such project two proposed high voltage (138,000 volt) primary transmission lines, approximately 73 miles and 116 miles long, and crossing, in part, lands of the United States, to connect with the Company's interconnected primary transmission system at Boise and American Falls, respectively, and to cost approximately $3,400,000 (R. 21). Neither line alone is capable of transmitting the entire power output of the Bliss plant, and consequently both must be used to transmit power away from the plant (R. 43), and thus are "primary lines" comprising a necessary part of a "project" (R. 46).

By reason of the urgent and immediate necessity for providing additional power for public use in the Bliss and Pocatello areas, the Company on April 26, 1949, applied for pre-license permission to proceed with construction of

the two 138-kilovolt lines. On May 2, 1949, the Commission notified the Company (R. 42) that such construction would not prejudice consideration by the Commission of the Company's application.

Shortly thereafter, the Department of the Interior, for the purpose of imposing upon the Company conditions similar to those contained in its new regulations, originally promulgated on October 14, 1948 (13 Fed. Reg. 6214), and amended July 18, 1949 (14 Fed. Reg. 4620), which purpose it could achieve only by forcing the Company to apply to it for a permit (43 CFR §§245.9 and 245.21), began an action to enjoin it from constructing the aforesaid transmission lines on the lands of the United States involved. This action was begun in the U. S. District Court for the District of Idaho in August 1949 (R. 42). And, following a trial on the merits, the injunction was denied by the District Court on September 30, 1949, *United States* v. *Idaho Power Co.*, 85 F. Supp. 913 (D. Idaho), *appeal dismissed*, 9th Cir., Feb. 13, 1950.

On October 13, 1949, the Commission entered its second order herein (R. 41), which includes the two 138 kilovolt transmission lines within the Project license. Among the new and additional terms and conditions contained in such order are those designated as Paragraph (F) thereof, comprising ten subparagraphs (R. 50-53), which is the subject of this proceeding for review. In substance Paragraph (F) requires, *inter alia*, that:

> (a) Upon request of the Secretary of the Interior, the Company shall, after notice from the Commission, convert, at the expense of the United States, its said 138 kilovolt transmission lines for operation at a voltage of 230 kilovolts;
>
> (b) The Company, either before or after any conversion of said lines to a higher voltage, shall permit any agency of the United States to interconnect any of its transmission facilities with such two transmission lines of the Company; and

(c) The Company, after such interconnection of its lines with transmission facilities of the United States, must permit transfer over such transmission lines of the Company of power and energy generated in power plants owned by the United States, in such amounts as will not unreasonably interfere with the Company's use of said lines. Such transmission capacity can be recovered by the Company, when needed for the requirements of its customers, only upon 24 months' notice (R. 64).

The above provisions and requirements of such Paragraph (F) are *specifically stated in the Commission's Order of October 13, 1949, to have been inserted therein at the request of the Secretary of the Interior* (R. 44). By order of January 18, 1950 (R. 61), the Commission made certain minor modifications in its order of October 13, 1949, including certain provisions of said Paragraph (F), but in no way materially altered the objectionable and unlawful provisions thereof, and thereupon denied the Company's Petition for Rehearing.

The subsequent proceedings in the Court of Appeals are as stated at p. 5 of the Petition for Certiorari and above in this brief under the caption "Jurisdiction".

SUMMARY OF ARGUMENT

As we have said above, basically only one question is presented for decision—can the Commission lawfully impose the conditions complained of? The additional question posed by the Petitioner, of purported judicial usurpation of administrative discretion, is not reached for determination upon the particular facts in this case. Here the Commission in its original determination of March 2, 1948, made all the findings required to support the order, including the determination that the Bliss project as a whole "is best adapted to a comprehensive plan for the improvement and

utilization of water power development", and that Respondent had complied with all requirements of the Act prerequisite to securing a license (Tr. 87-91 and R. 45). The conditions complained of, conceived and dictated, not by the Commission, but by the Secretary of the Interior, can in no way alter or recall the finality of the Commission's original determination. In consequence the order here under review still stands as a valid and complete instrument under the statute authorizing its issuance, although modified by the deletion of Paragraph (F) therefrom.

If usurpation of administrative discretion there be, the usurper is the Secretary of the Interior and not the court below. In every case relevant to this question cited in Petitioner's brief the factual situation was entirely different. In none of the cases does it appear (as it does here) that the administrative agency involved would have acted as it did absent the qualifying provisions stricken by the appellate tribunal. Here the Court of Appeals took the Commission at its word that this project was "best adapted to a comprehensive plan" under Section 10(a) of the Act, and affirmed the Commission's order issuing the license, without in any way attempting to substitute its judgment for that of the Commission or to exercise an administrative function, and in strict accordance with the "exclusive jurisdiction", specifically conferred by Section 313(b) of the Act, "to affirm, modify, or set aside such order in whole or in part."

The decision below is clearly correct. The legislative history of the Act clearly shows that Congress on two occasions, once in 1919 and again in 1935, specifically considered and flatly rejected proposals granting to the Commission the authority here sought to be exercised, and that on the last occasion a new subsection was added to the Act specifically to prevent the Commission from compelling private utilities to establish connection or exchange power with public plants. In short, the opinion below most properly followed the principle established by this Court that admin-

istrative action taken "to achieve that which Congress has refused to enact into law cannot be sustained",[6]

The Petitioner's brief makes clear that the moving party here is not the Commission but the Secretary of the Interior, and that the fundamental issue it seeks to reach is not the extent of the Commission's authority under the Federal Power Act but that of the Secretary under the Act of March 4, 1911. This is the precise question now awaiting trial in the United States District Court for the District of Columbia in *Idaho Power Company* v. *Oscar L. Chapman* (Civil Action No. 4540-50).

There is no conflict, on the facts in this case, with any decision of this Court, or of any other Federal court. On the contrary, it is plain that the decision below is in complete harmony with the views expressed by this tribunal. Manifestly, there is no important question of Federal law requiring decision at this time by this Court. No erosion of the statute involved has, nor can, occur, nor will the Federal Government be hampered in the proper exercise of its functions, by reason of the decision below. All that Respondent seeks is to halt an unlawful attempt to extend the regulatory powers of the Petitioner, who has a complete remedy in the Congress if it believes the authority sought should be delegated.

ARGUMENT

I. Only One Question is Reached for Determination on the Facts of This Case — The Authority of the Federal Power Commission Under the Act to Impose the Conditions Complained of.

Replying to Petitioner's brief in the order of its presentation we meet first the extraordinary statement (p. 11) that the Commission "has not had the opportunity to decide whether the project will fulfill the Act's commands if this significant condition [i.e. "to carry Government power over

---

[6] *Colgate-Palmolive Peet Co.* v. *National Labor Relations Board*, 338 U.S. 355, 364 (1949).

its project lines"] is eliminated." That is not so. Respondent in its original application filed on August 22, 1947, sought a license for a project consisting of a concrete dam, creating a reservoir extending upstream approximately 5 miles, a 69,000-kilowatt power plant integral with the dam, with transformers, switch yard, transmission lines connecting with applicant's 138-kilovolt transmission system, and appurtenant works (R. 12). All that was absent from the application were the technical details and drawings showing the specifications and locations for the lines to connect with the Respondent's transmission network (*id.*).

The Commission ascertained that the Public Utilities Commission and the Department of Fish and Game of Idaho had no objection to the project, and received a favorable report from the Corps of Engineers and, most interestingly, from the Assistant Secretary of the Interior, who, by letter of February 19, 1948 stated that "*The Department has no objection to the issuance of a license to the Idaho Power Company for its proposed Bliss Project, provided the recommendations*[7] *set forth are followed* and provided further that full provision is made for the carrying out of the recom-

---

[7] The "recommendations" referred to in the Assistant Secretary's letter were as follows:

"(1) That the license be conditioned upon the applicant's starting construction work within one year from the date of issue of the license and upon completing construction of at least the initial generating unit *together with the necessary transmission lines* and appurtenant works within five years of the date of the license.

(2) That, should the applicant determine it is damaged by subsequent upstream diversion of water by the United States in connection with its irrigation and conservation program, then the United States Government has the option, in full settlement of any and all claims by the applicant,

(a) of paying such damages as the applicant shall be then entitled to recover as a matter of law; or

(b) of acquiring the applicant's plant at its depreciated cost."

No mention of "wheeling" or transmission of power for the government was made or even suggested in the Assistant Secretary's letter.

mendations of the Fish and Wild Life Service which will be sent you at a later date." (R. 11).

Considering this record of approval by other interested agencies, including the Department of the Interior, the Commission in due course issued its order authorizing the issuance of a license for the project, and made all of the basic findings[8] required by the Act.

All that was said with respect to transmission lines, in conformity with the Commission's usual practice,[9] was that "It is desirable to reserve for determination at a later date the question of what transmission facilities should be included in the license as part of the complete project." (R. 13). It was not until several months after Respondent designated these lines as the transmission lines leading from the Bliss project that the Commission, on August 16, 1949, advised the Respondent of the Interior's request that its recently conceived regulations (first promulgated on October 14, 1948, 13 Fed. Reg. 6214, and sweepingly amended on July 18, 1949, 14 Fed. Reg. 4620)[10] be included in the terms of

---

[8] The Commission found, *inter alia* (R. 13-14), that:

"(13) The project does not affect any Government dam, nor will the issuance of a license therefor as hereinafter provided affect the development of any water resources for public purposes which should be undertaken by the United States itself.

(14) The issuance of a license as hereinafter provided will not interfere or be inconsistent with the purposes of any reservation or withdrawal of public lands of the United States.

(15) Under present circumstances and conditions and upon the terms hereinafter imposed, *the project is best adapted to a comprehensive plan for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes,*"

[9] See *Thirtieth Annual Report of the Federal Power Commission* (1950), pp. 162, 171 and 174.

[10] Parenthetically we point out that the purported regulations of the Secretary of the Interior set out in the Appendix to the Petitioner's brief are not those in effect at the present time (or since July 18, 1949), but the original text first issued on October 14, 1948. The current and greatly expanded regulations are set forth in Appendix A to this Brief. Their validity is the subject of the pending litigation referred to, *infra*, page 19.

the license *already authorized* (R. 25). The Department's request was made despite the fact that on February 19, 1948, it had advised the Commission that it had no objection to the issuance of a license for the Bliss project, provided that the totally unrelated recommendations then proposed were followed (See footnote 7, p. 12, *supra*).

The time sequence, alone, establishes conclusively that on March 2, 1948, when it authorized the Bliss project, the Commission could have had no thought in its mind of imposing the conditions herein complained of, as their prototype was not even established as a regulation of the Department of Interior until seven months later, on October 14, 1948. The inference that the Commission could have antecedently conceived of these conditions, independent of the Interior's regulations, is completely negated by the facts that its second order specifically states that the conditions of Paragraph (F) were "requested" by the Secretary of the Interior (R. 44, and see R. 33-38), and that the language, form and content of the conditions are obviously patterned on paragraph (v) of 43 CFR § 245.21, following the sweeping changes of July 18, 1949, set forth in Appendix A hereto. Further, in the more than 2,000 project licenses[11] issued by the Commission over the thirty-odd years of its existence, never have conditions been imposed even remotely resembling those complained of here.

It is thus apparent that the Commission's finding that the Bliss project was "best adapted" to the statutory policy declared in Section 10(a) was in no way dependent upon the subsequent insertion in the license of the illegal condi-

[11] See *Thirtieth Annual Report of the Federal Power Commission (1950)*, p. 194. Pages 161-183 of this Report also well illustrate the standard pattern of terms and conditions imposed in licenses by the Commission at the time of, and subsequent to, the issuance of the license in this case, relating generally to conservation measures, restrictions on slashing of timber, prevention of fire hazards, use of the project area for public recreational purposes, and similar matters.

tions complained of. The statement (Pet. Br. p. 11) that "The Commission has determined that the Bliss project will conform with these statutory standards [only] if the company is required as part of its license, to carry government power over its project lines" is obviously without foundation.

The foregoing, coupled with the tone and content of the Petitioner's entire brief, also makes abundantly clear that the moving party in this case is the Secretary of the Interior and not the Federal Power Commission, the names of whose counsel, oddly enough, appear nowhere in the Petition and Brief. A stranger to this litigation reading, for example, the argument of Petitioner's Brief at pp. 14-23, entirely aside from the fact that it contains matters not in the record, would be at a considerable loss to understand why the Federal Power Commission is designated as the Petitioner; particularly in light of the extraordinary statement (p. 14) that: "Acquiescence by the Secretary of the Interior in the jurisdiction of the Commission and in the issuance of the license resulted from imposition of the condition in question." *Obviously the jurisdiction of the Commission, an independent agency created by statute, is in no way dependent on the "acquiescence" of the Secretary or of any other governmental agency, but solely on what has been enacted by Congress in the Federal Power Act.*

The only possible connection the Secretary has with this case lies in the fact that Section 4(e) of the Act provides:

> "That licenses . . . issued within any reservation . . . shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the *adequate protection and utilization of such reservation.*"

Here, of the total 189 miles of transmission line involved, 98 miles cross open public land. Only 27 miles are within

reservations of the United States, and these are not National forests, parks, monuments or other similar reservations, but merely reclamation withdrawals (under the Reclamation Act of June 17, 1902, 32 Stat. 388), whose use would be wholly unaffected by the mere erection of transmission lines. No part of the Bliss dam, power plant, or reservoir is within a reservation of the United States under the "supervision" of the Secretary. The short answer is, of course, that the Secretary has no possible authority under the Federal Power Act to propose the conditions complained of (R. 50-53), as *they have no relation whatever to the "protection and utilization of such reservations"* (See, R. 22). If any usurpation of administrative discretion there be, the usurper is the Secretary of the Interior in thrusting conditions, unauthorized by the Act, upon the Commission, which has very pointedly disclaimed authorship of the stricken portion of its order, *which consists solely of the conditions requested by the Secretary* (R. 44).

It is therefore clear that the additional question raised by the Petition is not reached for determination and that the cases cited therein on that subject have no application to the particular facts of this case.

Certainly, where Congress has delegated authority to an administrative agency to regulate and determine matters relating to a particular segment of the economy, it is not within the province of the judiciary to usurp the agency's authority by attempting to regulate and determine such matters itself. This is all that was decided in the first group of cases cited at page 12 of the Petitioner's Brief.[12] Likewise, where a reviewing court determines that an administrative order cannot be upheld because an essential finding of fact upon which the order must be based has not been made, the reviewing court is powerless to supply the miss-

---

[12] *General American Tank Car Corporation* v. *El Dorado Terminal Co.*, 308 U.S. 422 (1940); *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907); *St. Louis, Brownsville & Mexico Ry. Co.* v. *Brownsville Navigation District*, 304 U.S. 295 (1938); *Southern Ry. Co.* v. *Tift*, 206 U.S. 428 (1907).

ing finding and must remand the case to the agency for further administrative action. Such is the rule laid down by this Court in the next group of cases cited by Petitioner at page 12 of its Brief.[13] Here the record is complete and no further administrative findings are necessary for the purpose of determining that the statutory criteria for the issuance of a license have been satisfied.

Nor does the action of the Court of Appeals in modifying and affirming the Commission's order conflict in any way with *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948) and *Addison* v. *Holly Hill Co.*, 322 U.S. 607 (1944), also cited by Petitioner at page 12. In both of these decisions, a part of one paragraph of an administrative order or regulation was found to be invalid, while the remainder of the paragraph was sustained. In each instance it was assumed that the agency involved might not have issued the valid part of the contested paragraph by itself if it had realized initially that the invalid segment was in excess of its statutory authority. Accordingly, the Court acknowledged the agency's power to conduct further proceedings for the purpose of determining how the contested paragraph should be redrafted. However, such decisions clearly presupposed that the administrative body had been authorized by Congress to promulgate in some

---

[13] *Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608 (1946); *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212 (1933); *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. 364 (1939); *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940). For example, in the *Pottsville* case, 309 U.S. 134, 145: "The Commission originally found Respondent's application inconsistent with the public interest because of an erroneous view regarding the law of Pennsylvania." Having determined that the Commission had committed an error of law in denying the license application, the Court could not further direct the issuance of a license, since the requisite finding of public convenience and necessity had never been made by the agency. And as stated by this Court in the *Ford Motor Co.* case, *supra*, at p. 373: "while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action."

form an order or regulation dealing with the general subject matter of the contested paragraph.

In marked contrast, the decision of the Court of Appeals here specifically holds that the Federal Power Act "cannot be construed to require the interconnection of private facilities with public facilities and the compulsory transmission of public power by a private company; in view of the fact *that Congress specifically forebade such interconnection in the Part of the statute which deals with this subject,*" 189 F. 2d 665, 670. Thus, in view of the result reached by the Court, it would have been an idle gesture to remand the case for further proceedings to determine what conditions, relating to the use of such transmission facilities by the Federal government, might have been substituted in the license in place of Paragraph (F), as the court had already determined that the Commission had no authority to act within that field. In consequence, the order here under review still stands as a valid and complete instrument under the statute authorizing its issuance, although modified by striking Paragraph (F) therefrom.

Finally, Section 313(b) of the Federal Power Act, in providing for the review of orders of the Commission, expressly provides that the Federal Courts of Appeals "shall have exclusive jurisdiction to affirm, modify, or set aside such orders in whole or in part." Had Congress desired to confine the reviewing courts' authority to merely affirming or setting aside Commission orders it could have so limited its grant of power, as it did in enacting the Communications Act of 1934 (48 Stat. 926, 47 U.S.C. § 402(e)). Instead, such courts were empowered not only to affirm or set aside, but also to "*modify * * * in whole or in part.*" The plain meaning of statutory language cannot be disregarded, and under similar statutes the power has been frequently exercised.[14] Therefore, viewed against the factual background of the instant case, the Court's procedural mandate was not only proper but manifestly requisite.

---

[14] *Alberty* v. *Federal Trade Commission*, 182 F. 2d 36 (D.C. Cir. 1950) *cert. denied*, 340 U.S. 818 (1950); *Gimbel Bros.* v. *Federal Trade Commis-*

II. The Merits of the Public Power Program and the Authority of the Secretary of the Interior Under Other Statutes are Not at Issue Here.

In attempting to enlarge the litigation here into an important federal question, the brief of the Solicitor General makes proof conclusive that the voice is the Federal Power Commission's voice but the hands are the hands of the Secretary of the Interior. The detailed exposition of the public power program of the Federal Power Government (Pet. Br. pp. 18-21), based on facts entirely *dehors* the record, is as irrelvant to the issue here as the discussion of the authority of the Secretary under the Act of March 4, 1911 (Pet. Br. pp. 21-23).

The Act of March 4, 1911 and the regulations of the Secretary of the Interior promulgated thereunder (43 C.F.R. §245.21) are the statute and regulations now at issue in *Idaho Power Company* v. *Oscar L. Chapman*, (Civil Action No. 4540-50) in the United States District Court for the District of Columbia. This declaratory judgment action was brought to have declared the invalidity of subsections (r) and (v) of such Section 245.21 on the grounds, *inter alia*, that they are in excess of the Secretary's statutory authority, constitute attempted legislation, and are arbitrary, capricious and unreasonable. Such cause has been heard at pre-trial and set for trial in the District Court on March 6, 1952. The Petitioner's attempt to pre-try that cause in this forum is patently improper and premature. The issue here is the extent of the Commission's authority under the Federal Power Act.

In passing we point out, however, that Petitioner is inaccurate even in its irrelevancies. Petitioner's brief states

---

sion, 116 F. 2d 578 (2d Cir. 1941); *Educators Ass'n.* v. *Federal Trade Commission*, 108 F. 2d 470 (2d Cir. 1939), *decision modified*, 118 F. 2d 562 (2d Cir. 1941); *Belmont Laboratories* v. *Federal Trade Commission*, 103 F. 2d 538 (3d Cir. 1939); and *National Labor Relations Board* v. *U. S. Truck Co.*, 124 F. 2d 887 (6th Cir. 1942).

(p. 18) that "The construction of power plants by the United States was more or less limited until the past decade," and that "The recent development of the public power program explains the absence of conditions for wheeling in earlier licenses granted by the Commission." The facts are to the contrary.

The Annual Report of the Secretary of the Interior (1950), cited at page 20 of Petitioner's Brief, shows (pp. 49-51) that of the 3,312,267 kilowatts, of installed generating capacity of the public power projects there listed as being in operation on June 30, 1950, 2,818,167 kilowatts, or approximately 85%, was installed in 1942 or earlier. As the tabulation indicates, the great surge in the kilowatt installation of public power projects came in the years 1935-1942, and therefore such projects were *authorized* at the time when Congress deliberately considered, and withheld from the Commission, the power herein claimed. In fact, as Petitioner's Brief inadvertently points out (pp. 18-19), two of the largest public power plants, Bonneville and Grand Coulee, were authorized in 1935, the exact year in which Congress added Section 201(f) to the Federal Power Act and categorically stated its intention with respect to the issue here (see page 23 *infra*). The third major unit, Hoover Dam, was authorized by the Act of May 29, 1928, c. 918 (45 Stat. 1011).

Respondent has no means of knowing what Federal and "non-Federal developments" are involved in the vague reference to "proposed interconnections," at page 19 of Petitioner's brief. But such statement, and the statement at page 21, that "such [wheeling] arrangements *will be desirable*", have no bearing upon the issue here, nor can they enlarge the power and authority of either the Secretary or the Commission. *Cf. Morrill* v. *Jones*, 106 U.S. 466, 467 (1883).

We do point out, however, that Respondent has for more than 30 years engaged with the Bureau of Reclamation in "wheeling" power generated at dams of the Federal Gov-

ernment over its transmission lines, *on a contract basis*, But when, through the device of conditions to a license or permit, the Federal Government places a pistol at the Company's head and, in effect, says "This is your contract, sign it," the victim cannot very well be accused of a failure to cooperate.

Further, as we have pointed out above, Petitioner's purported summarization (p. 22) of the provisions of 43 C.F.R. §245.21(v) is inaccurate and misleading as the quotation is from the original version of the regulations, and does not reflect the sweeping changes effected by the amendment of July 18, 1949, set out in Appendix A hereto.

In sum, the answer as to why "wheeling" provisions have never been suggested before as conditions to Federal Power Commission licenses during the 30 years of that agency's existence is not that public power, in 1949, was a new and novel concept, but more obviously a perverse application of a much older concept that "a man's reach should exceed his grasp." Thus we must apply the rule laid down by this Court in *Federal Trade Commission* v. *Bunte Bros.*, 312 U.S. 349, 352 (1941):

> "just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred".[15]

---

[15] See also *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 513 (1949) where this Court said:

> "Thus for over *ten years* the Commission has never claimed the right to regulate dealings in gas acreage. Failure to use such an important power for so long a time indicates to us that the Commission did not believe the power existed."

III. The Decision Below is Clearly Correct.

Adopting the Solicitor General's view of the question of federal law here involved, "the problem of statutory interpretation assumes" (Pet. Br. p. 23), on the facts of this case, a very minor importance. And it is abundantly clear that the interpretation of the Federal Power Act by the Court of Appeals was entirely correct from any point of view.

Petitioner's only arguments on the merits are that the prohibitions of Part II of the Federal Power Act do not apply to the issue of licenses under Part I, and that "The decision below would convert the limited grant of additional power [under Part II of the Act] into the repeal of authority previously enjoyed." (Pet. Br. p. 30). The first contention was specifically considered and rejected by the unanimous opinion below; the latter assertion completely overlooks the legislative history of the earlier Federal Water Power Act, which is now Part I of the Federal Power Act. During the debate in 1919 upon the bill (H.R. 3184) which became the Federal Water Power Act, the same "common carrier" concept proposed and rejected in the 1935 amendments,[16] was advanced and also rejected at that

---

[16] All of the "common carrier" provisions (Hearings before House Committee on Interstate and Foreign Commerce on H.R. 5423, 74th Cong., 1st Sess., p. 531) of the original Wheeler-Rayburn bills, which in 1935 added Part II of the Federal Power Act (S. 1725 and H.R. 5423, 74th Cong., 1st Sess.), were entirely eliminated upon the enactment of the statute. The final Senate Committee Report states (Senate Report No. 621 to accompany S. 2796, 74th Cong., 1st Sess., May 13, 1935, p. 19):

> ". . . Section 202(a) of S. 1725 imposed upon each public utility the duty to furnish energy to exchange energy with and transmit energy for *any person* upon reasonable request. This provision has been eliminated . . . . While imposition of these duties may ultimately be found to be desirable, the committee does not think that they should be included in this first exercise of Federal power over electric companies. . . . Furthermore, the provisions of the old section 203(b), empowering the Federal Power Commission to require one utility to permit the use of its facilities by another, or to make extensions or improvements have been eliminated; *these matters are left to the voluntary action of the utilities.*"

time.[17]

It is therefore clear that even if Part I be considered as independent of Parts II and III of the Federal Power Act, Congress has already expressed its intent to prohibit the Federal Government, in the circumstances that exist here, from requiring licensees (the only utility companies subject to Part I) to transmit power for *anyone*.

Of even greater significance is the fact that in 1935 Congress specifically considered whether the Commission should have the power to require "private companies", and not specifically "public utilities" as defined in the Act (see Hearings before House Committee on Interstate Commerce on H.R. 5423, 74th Cong., 1st Sess., pp. 514-15, 546 and 549), to transmit public power. As the DeVane testimony indicates (Pet. Br. pp. 27-28), this controversial subject was considered at great length before the Committee. And such requirement was specifically prohibited by the addition of a new subsection to the Act, 201(f), as is made clear by the final Senate Report relating thereto.

---

[17] Representative Mays proposed the following amendment to H.R. 3184 (58 Congressional Record, 66th Cong., 1st Sess., (1919), p. 2136):

> "(g) That all transmission lines constructed or operated under authority of this act shall be constructed, operated, and maintained as *common carriers*."

There followed the colloquy below between Representative Mays and Representative Esch (*ibid.* p. 2137):

> "Mr. Mays: Why do you make railroads common carriers and why do you make pipe lines common carriers?
>
> "Mr. Esch: We have made both of those common carriers because they entered into interstate commerce. But the *theory of this bill is to allow the State regulatory body to have control over* the rates, the securities, and other features of the *transmission lines and power developments within the State*, and it is only where the current is interstate and where the State commissions cannot agree, or where there is no commission, that we give this commission the powers that are granted to the Interstate Commerce Commission."

The Mays amendment was overwhelmingly defeated. (*ibid.*)

The Report (No. 621, 74th Cong., 1st Sess., May 13, 1935, p. 19) states:

> "Despite repeated assurances by representatives of the Federal Power Commission that no such authority was intended, the charge was frequently made that *the bill as originally introduced authorized the Commission to compel private utilities to establish connection or exchange power with public plants.* This new subsection carries out in unmistakable terms the original intention of the bill in this respect."

It is obvious that if Congress had intended in 1935 to grant so far reaching a power to the Commission with respect to licensees under Part I, specifically denied by the defeat of the Mays' amendment in 1919, it would have done so directly, as it did, at the same time, in amending the Mineral Leasing Act (41 Stat. 449, 30 U.S.C. § 185). The amendments to this act, approved *five days prior* to the signature of the Public Utility Act of 1935, on August 26, 1935, added the specific requirement that pipe line companies crossing the public lands "shall accept, convey, transport * * * oil or natural gas produced from Government lands in the vicinity of the pipe line in such proportionate amounts as the Secretary of the Interior may * * * determine to be reasonable" (Act of August 21, 1935, c. 599, § 1, 49 Stat. 687).

Further, Congress took pains to correlate Parts I and II of the Act in the 1935 amendments by substituting "this Part" for "this Act" in the base sentence of Section 10 of Part I, but left unchanged the restriction contained in subsection 10(g), which provides "Such other conditions not inconsistent with the provisions *of this Act* as the Commission may require." It is therefore plain that Petitioner is specifically limited, in imposing conditions to licenses under Part I, by the restrictions on its power contained in Part

II, and that it may not divide the Act into mandates to be separately applied as its desires of the moment dictate.[18]

In substance then the Petitioner seeks to abrogate the rule laid down by this Court in *Colgate-Palmolive Peet Co.* v. *National Labor Relations Board*, 338 U.S. 355, 364 (1949) that administrative action taken "to achieve that which Congress refused to enact into law cannot be sustained." If it is "desirable" that Petitioner have authority to force licensees, as the price for a license under the Federal Power Act, to transmit power generated by Government plants, without their consent, Congress should be asked to make provision to that effect instead of Petitioner's seeking to extend the ambit of its authority through the guise of "conditions" to a license.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

A. C. INMAN,

HARRY A. POTH, JR.,
Counsel for Respondent.

LOUIS E. CHARNLEY, JR.,
Of Counsel.

February 1952

---

[18] See also *Safe Harbor Water Power Corp.* v. *Federal Power Commission*, 179 F. 2d 179, 185 (footnote 10), *cert. denied*, 339 U.S. 957 (1959), where the Third Circuit pointed out:

> "Section 212 of the Public Utility Act of 1935, 49 Stat. 847, specifically provides that 'Section 1 to 29 incl. of the Federal Water Power Act, as amended, shall constitute Part I of [The Federal Power Act] . . .' Section 213 provides that 'The Federal Water Power Act, as amended, *is further amended by adding thereto the following parts* . . .' There follows Parts II and III being specifically designated in Section 320 as the 'Federal Power Act.'"

APPENDIX A

Excerpt from 14 Federal Register 4620
(July 23, 1949)

TITLE 43—PUBLIC LANDS: INTERIOR

CHAPTER 1—BUREAU OF LAND MANAGEMENT, DEPARTMENT OF THE INTERIOR

Part 245—Rights-of-Way Over and Upon Public Lands and Reservations of the U. S. for Electrical Plants and Transmission Lines

Stipulation Required as Condition Precedent to Approval of Permit

Paragraph (v) of § 245.21, as amended on October 14, 1948 (13 F. R. 6214), is revised to read as follows:

§ 245.21 *Stipulation required as a condition precedent to the approval of permit.* * * *

(v) To allow the Department of the Interior, in the case of a permit or an easement applied for on or after October 14, 1948, and covering a right-of-way for an electrical transmission line having a voltage of 33 kv. or more, (1) to utilize for the transmission of electrical power any surplus capacity of the line in excess of the capacity needed by the holder of the permit or easement (subsequent referred to in this paragraph as "the permittee") for the transmission of electrical power in connection with the permittee's operations, or (2) to increase the capacity of the line at the Department's expense and to utilize the increased capacity for the transmission of electrical power. Utilization by the Department of surplus or increased capacity shall be subject to the following terms and conditions:

(i) When the Department desires to utilize surplus capacity thought to exist in a line, notification will be given to the permittee and the permittee shall furnish to the Department within 30 days a certificate stating whether the line has any surplus capacity not needed by the permittee for the transmission of electrical power in connection with the permittee's operations, and, if so, the extent of such surplus capacity.

(ii) In order to utilize any surplus capacity certified by the permittee to be available, or any increased capacity provided by the Department at its own expense, the Department may interconnect its transmission facilities with the permittee's line in a manner conformable to approved standards of practice for the interconnection of transmission circuits.

(iii) The expense of interconnection will be borne by the Department, and the Department will at all times provide and maintain adequate switching, relaying, and protective equipment so as to insure that the normal and efficient operation of the permittee's line will not be impaired.

(iv) After any interconnection is completed, the permittee shall operate and maintain its line in good condition; and, except in emergencies, shall maintain in a closed position all connections under the permittee's control between the permittee's line and the interconnecting facilities provided by the Department.

(v) The interconnected power systems of the Department and the permittee will be operated in parallel.

(vi) The transmission of electrical power by the Department over the permittee's line will be effected in such manner and quantity as will not interfere unreasonably with the permittee's use and operation of the line in accordance with the permittee's normal operating standards, except that the Department shall have the exclusive right to utilize any increased capacity of the line which has been provided at the Department's expense.

(vii) The permittee will not be obligated to allow the transmission over its line by the Department of electrical power to any person receiving service from the permittee on the date of the filing of the application for a permit or easement, other than persons entitled to statutory preference in connection with the distribution and sale of electrical power by the Department.

(viii) The Department will pay to the permittee an equitable share of the total monthly cost of maintaining and operating the part of the permittee's line utilized by the Department for the transmission of electrical power, the payment to be an amount in dollars representing the same pro-

portion of the total monthly operation and maintenance cost of such part of the line as the maximum amount in kilowatts of the power transmitted on a scheduled basis by the Department over the permittee's line during the month bears to the total capacity in kilowatts of that part of the line. The total monthly cost may include interest and amortization, in accordance with the system of accounts prescribed by the Federal Power Commission, on the permittee's net total-investment (exclusive of any investment by the Department) in the part of the line utilized by the Department.

(ix) If, at any time subsequent to a certification by the permittee that surplus capacity is available for utilization by the Department, the permittee needs for the transmission of electrical power in connection with its operations the whole or any part of the capacity of the line theretofore certified as being surplus to its needs, the permittee may modify or revoke the previous certification by giving the Secretary of the Interior 30 months' notice, in advance, of the permittee's intention in this respect. After the revocation of a certificate, the Department's utilization of the particular line will be limited to the increased capacity, if any, provided by the Department at its expense.

(x) If, during the existence of the permit or easement, the permittee desires reciprocal accommodations for the transmission of electrical power over the interconnecting system of the Department to its line, such reciprocal accommodations will be accorded under terms and conditions similar to those prescribed in this paragraph with respect to the transmission by the Department of electrical power over the permittee's line.

(xi) The terms and conditions prescribed in this paragraph may be modified at any time by means of a supplemental agreement negotiated between the permittee and the Secretary of the Interior or his designee.

(31 Stat. 790, 791 as amended; 43 U. S. C. 959, 961)

[SEAL] J. A. KRUG,
Secretary of the Interior.

JULY 18, 1949.

[F. R. Doc. 49—6033; Filed, July 22, 1949; 8:45 a. m.]

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
OCT 14 1952
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1952

No. 12

FEDERAL POWER COMMISSION, *Petitioner,*

v.

IDAHO POWER COMPANY, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR IDAHO POWER COMPANY RESPONDENT

HARRY A. POTH, JR.,
REID & PRIEST,
910 17th St., N. W.,
Washington 6, D. C.,

A. C. INMAN,
1220 Idaho St.,
Boise, Idaho,
Counsel for Respondent.

JAMES E. O'BOYLE,
EDWARD L. KANTER,
REID & PRIEST,
910 17th St., N. W.,
Washington 6, D. C.,
Of Counsel.

October, 1952.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	3
Statement of Facts	3
Summary of Argument	13
Argument:	
I. This Court Does Not Have Jurisdiction to Review This Case Because the Petition for Writ of Certiorari Was Not Filed Within the Prescribed Time	16
A. A motion for mere formal changes in judgment does not toll the time for appeal	17
B. Even if the "Motion for Clarification" is construed as a motion affecting the substance of the Judgment, it was untimely and therefore did not toll the time for appeal	21
C. Petitioner has not sustained the burden of showing affirmatively that this Court has jurisdiction	25
II. Modification of the Order of the Federal Power Commission Without Remand Was Entirely Appropriate	28
III. No Power Has Been Conferred Under Any Act of Congress to Impose the Conditions Complained of Upon Any License Issued Under the Federal Power Act	35
A. No such authority was conferred, either expressly or by implication, by the Federal Power Act of 1920	38
B. The authority here claimed was specifically withheld by Congress in enacting the Federal Power Act of 1935	41

Page

C. No other federal statute confers authority upon either the Commission or the Department of Interior to impose conditions upon licenses inconsistent with the Federal Power Act 47

D. The fact that Petitioner has not exercised so important a power for nearly thirty years is further proof that such authority was not conferred by Congress 50

IV. The Action of Petitioner Constitutes Attempted Legislation and Cannot Be Sustained 53

V. The Conditions and Requirements Imposed by Paragraph (F) of the Commission's Order Are Arbitrary and Unreasonable, and Deprive Respondent of Its Property Rights Without Due Process of Law 54

VI. The Conditions Complained of Constitute a Seizure of Respondent's Property Without the Authorization of Congress 61

Conclusion 65

Appendix 66

CITATIONS.

CASES:

A. B. Leach & Co. v. *Peirson*, 275 U. S. 120 (1927) .. 51
Addison v. *Holly Hill*, 322 U. S. 607 (1944) 33
Alberty v. *Federal Trade Commission*, 182 F. 2d 36 (D. C. Cir. 1950, cert. denied 340 U. S. 818) 29
Belmont Laboratories v. *Federal Trade Commission*, 103 F. 2d 538 (3rd Cir. 1939) 29
Bowman v. *Loperena*, 311 U. S. 262 (1940) 21
Bradley v. *Pace*, 183 F. 2d 806 (D. C. Cir. 1950) 25
Campbell v. *Galeno Chemical Co.*, 281 U. S. 599 (1930) 56, 59
Century Metalcraft Corporation v. *Federal Trade Commission*, 112 F. 2d 443 (7th Cir. 1942) 30
Commissioner of Internal Revenue v. *Bedford's Estate*, 325 U. S. 283 (1945) 27

Page

Connecticut Light & Power Co. v. *Federal Power Commission*, 324 U. S. 515 (1945) 40
Denholm & McKay Co. v. *Commissioner of Internal Revenue*, 132 F. 2d 243 (1st Cir. 1942) 17
Department of Banking v. *Pink*, 317 U. S. 264 (1942) 16, 17, 19, 21
Eccles v. *Peoples Bank of Lakewood Village*, 333 U. S. 426 (1948) 37
Educators Ass'n v. *Federal Trade Commission*, 108 F. 2d 470 (2d Cir. 1940) 30
Far East Conference v. *United States*, 342 U. S. 570 (1952) 28
Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U. S. 134 (1940) 33
Federal Power Commission v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498 (1949) 52
Federal Trade Commission v. *Beech Nut Packing Co.*, 257 U. S. 441 (1922) 29
Federal Trade Commission v. *Bunte Bros. Inc.*, 312 U. S. 347 (1941) 52
Federal Trade Commission v. *Morton Salt Co.*, 334 U. S. 37 (1948) 33
Federal Trade Commission v. *Royal Milling Co.*, 288 U. S. 212 33
Fine v. *Paramount Pictures*, 181 F. 2d 300 (7th Cir. 1950) 23
First Iowa Hydro-Elec. Corp. v. *Federal Power Commission*, 328 U. S. 152 (1946) 40
Florida v. *United States*, 282 U. S. 194 (1931) 28
Folds v. *Federal Trade Commission*, 187 F. 2d 658 (7th Cir. 1951) 30
Ford Motor Company v. *National Labor Relations Board*, 305 U. S. 364 (1939) 33
Forsythe v. *City of Hammond*, 166 U. S. 506 (1897) 16
Frost Trucking Co. v. *Railroad Commission of California*, 271 U. S. 583 (1926) 59, 60
General American Tank Car Corporation v. *El Dorado Terminal Co.*, 308 U. S. 422 (1940) 28
Gimbel Bros. Inc., v. *Federal Trade Commission*, 116 F. 2d 578 (2d Cir. 1941) 29
Ginsburg & Sons. v. *Popkin*, 285 U. S. 204 (1932) ... 47

Page

Gulf Refining Co. v. *United States*, 269 U. S. 125 (1925) 20
Gypsy Oil Co. v. *Escoe*, 275 U. S. 498 (1927) 21
Hamilton et al. v. *Regents of the University of California*, 293 U. S. 245 (1934) 36
Hill v. *Hawes*, 320 U. S. 520 (1944) 24
Hope Basket Company v. *Product Advancement Corp.*, 342 U. S. 833 (1951) 16
Idaho Power Company v. *Chapman* (D. D. C. Civil Action No. 4540-50, June 2, 1952) 37, 48
Idaho Power Co. v. *Federal Power Commission*, 189 F. 2d 665 (D. C. Cir. 1951) 12, 32
International Ry. Co. v. *Davidson*, 257 U. S. 506 (1922) 59
Interstate Commerce Commission v. *Oregon-Washton R. & Nav. Co.*, 288 U. S. 14 (1933) 45
Joy Silk Mills v. *National Labor Relations Board*, 185 F. 2d 732 (D. C. Cir. 1950, cert. denied, 341 U. S. 914) 30
Kepner v. *United States*, 195 U. S. 100 (1904) 47
Klein's Outlet v. *Lipton*, 181 F. 2d 713 (2d Cir. 1950, cert. denied 340 U. S. 833) 27, 28
Leishman v. *Associated Wholesale Electric Company*, 318 U. S. 203 (1943) 17
Lynch v. *People of New York ex rel Pierson*, 293 U. S. 52 (1934) 26
MacEvoy Co. v. *United States*, 322 U. S. 102 (1944) 46
Mahler v. *Eby*, 264 U. S. 32 (1924) 28
Manhattan General Equipment Co. v. *Commissioner of Internal Revenue*, 297 U. S. 129 (1936) 53, 59
Marion v. *United States*, 171 F. 2d 185 (9 Cir. 1949, cert. denied 337 U. S. 944) 23
Matton Steamboat Co. v. *Murphy*, 319 U. S. 412 (1943) 25
Mayflower Hotel Protective Com. Mayflower Hotel Corp., 193 F. 2d 666 (D. C. Cir. 1951) 26
Memphis Natural Gas Co. v. *Beeler*, 315 U. S. 649 (1942) 26
Miller v. *United States*, 294 U. S. 435 (1935) 54
Missouri v. *Ross*, 299 U. S. 72, 76 (1936) 47
Morrill v. *Jones*, 106 U. S. 466 (1883) 51, 60
Morse v. *United States*, 270 U. S. 151 (1926) 21

Page

National Labor Relations Board v. *Express Publishing Company*, 312 U. S. 426 (1941) 29
National Labor Relations Board v. *Jones & Laughlin Steel Corp.*, 331 U. S. 416 (1947) 29
National Labor Relations Board v. *Walt Disney Production*, 146 F. 2d 44 (9th Cir. 1945) 30
Nealon v. *Hill*, 149 F. 2d 883 (9th Cir. 1945, cert. den. 326 U. S. 753) 23
Panama Refining Co. v. *Ryan*, 293 U. S. 388 (1935) .. 28
Pfister v. *Northern Illinois Finance Corporation*, 317 U. S. 144 (1942) 21, 25, 26
Rogers v. *Hill*, 289 U. S. 582 (1933) 20
St. Louis, B. & M. Ry. Co. v. *Brownsville Navigation District*, 304 U. S. 295 (1938) 28
Safeway Stores, Inc. v. *Coe*, 136 F. 2d 771 (D. C. Cir. 1943) 22, 23
Santa Fe-Pacific Ry. Co. v. *Lane*, 244 U. S. 492 (1917) 54
Schuette, Petition of, 178 F. 2d 920 (2d Cir. 1949) .. 27
Sinclair v. *United States*, 279 U. S. 263 (1929) 36
Siegel Co. v. *Federal Trade Commission*, 327 U. S. 608 (1946) 33
Southern Ry. Co. v. *H. H. Tift*, 206 U. S. 428 (1907) 29
Texas & Pacific Ry. Co. v. *Abilene Cotton Oil Co.*, 204 U. S. 426 (1907) 29
Townsend v. *Little*, 109 U. S. 504 (1883) 47
United States ex rel Chapman v. *Federal Power Commission*, 191 F. 2d 796 (4th Cir. 1951, cert. granted 343 U. S. 941) 9
United States ex rel Esshoc v. *Fluckey*, 19 F. 2d 64 (6th Cir. 1927) 51
United States v. *Block*, 160 F. 2d 604 (9th Cir. 1947) 51
United States v. *Chicago, Milwaukee, St. P. & P. Ry. Co.*, 282 U. S. 311 (1931) 28, 29, 34
United States v. *City & County of San Francisco*, 310 U. S. 16 (1940) 36
United States v. *Colorado Power Co.*, 240 F. 217 (D. Col. 1916) 56, 61
United States v. *George*, 228 U. S. 14 (1913) 53
United States v. *Idaho Power Co.*, 85 F. Supp. 913 (S. D. Idaho) Appeal dismissed (9th Cir. Feb. 13, 1950) 10

Page

United States v. *Interstate Commerce Commission*, 337 U. S. 426 (1949) 29
United States v. *Jones*, 336 U. S. 641 (1949) 29
United States v. *Seminole Nation*, 299 U. S. 417 (1937) 19
United States v. *United Verde Copper Co.*, 196 U. S. 207 (1905) 54
Wichita R. & Light Co. v. *Public Utilities Commission*, 260 U. S. 48 (1922) 28
Wayne United Gas Co. v. *Owens Co.*, 300 U. S. 131 (1937) 27
Work v. *State of Louisiana*, 269 U. S. 250 (1925) .. 54
Youngstown Sheet & Tube Co. v. *Sawyer*, 343 U. S. 937, 72 Sup. Ct. 863 (1952) 37, 51, 62, 63, 64
Zimmern v. *United States*, 298 U. S. 167 (1936) 17

CONSTITUTION AND STATUTES OF THE UNITED STATES:

United States Const. Art. I § 1 53
Act of Mar. 2, 1889, 25 Stat. 855 as amended 49 USC § 11 50
Act of March 4, 1911, 56 Stat. 1253, 43 USC § 957 ... 48
Act of Dec. 21, 1928, 45 Stat. 1057, 43 USC 617 51
Act of June 23, 1930, 46 Stat. 797, as amended 16 USC § 792 49
Administrative Procedure Act, 60 Stat. 243; 5 USC 1009 12
Flood Control Act of 1944, 28 Stat. 887 47
Federal Power Act, 49 Stat. 847 (1935) as amended 16 USC 791a 3, 41, 47
Section 3(11) 7, 9
Section 4(e) 3, 5, 8, 38, 48, 57
Section 6 ..... 6, 42, 56
Section 10(a) 6, 31, 32
Section 10(c) 48
Section 10(e) 48, 57, 58
Section 10(g) 48
Section 16 62
Section 18 57
Section 24 57
Section 201(f) 44, 51
Section 202(b) 54
Section 313(a) 9
Section 313(b) 9, 12, 16

Page

Federal Water Power Act of 1920, 41 Stat. 1063 ... 37, 38, 49, 50, 53
Section 4(d) ... 38
Section 10 ... 42
Hetch-Hetchy Act of December 19, 1913 (38 Stat. 242) ... 36
Interstate Commerce Act, 24 Stat. 379 (1887), as amended 49 USC § 1 (Supp. 1952) ... 50
Mineral Leasing Act of 1920, 41 Stat. 449, 30 USC § 185 ... 38, 45
Public Utility Act of Aug. 26, 1935, 49 Stat. 838 ... 41, 42, 45
Reclamation Act of June 17, 1902, 32 Stat. 388 ... 46
28 USC § 452 (Supp. 1952) ... 24
28 USC § 1254(1) (Supp. 1952) ... 16
28 USC § 2101(c) (Supp. 1952) ... 2, 3, 16

MISCELLANEOUS:

Annual Report of the Secretary of the Interior, 49-31 (1950) ... 50
Federal Power Commission Rules of Practice and Procedure, § 1.34 ... 9
Federal Rules of Civil Procedure
Rule 6(b) ... 24
Rule 59(b) ... 24
Rule 73 ... 21, 22, 23, 24
Hearings Before House Committee on Interstate and Foreign Commerce on H. R. 11408, 71st Cong., 2d Sess., 48-49 (1930) ... 49
Hearings Before House Committee on Interstate and Foreign Commerce on H. R. 5423, 74th Cong., 1st Sess., 531 (1935) ... 39, 42
Hearings Before House Committee on Public Lands on H. R. 14893, 63rd Cong., 2d Sess. (1914) 496 ... 55
Hearings Before Senate Committee on Interstate Commerce on S. 1725, 74th Cong., 1st Sess. (1935) 43
Hearings Before Subcommittee of Committee on Appropriations, 82d Cong., 1st Sess. 498-541 (1951) 62, 63
H. R. Rep. No. 715, 65th Cong., 2d Sess. (1918) 29 ... 55
H. R. Rep. No. 1318, 74th Cong., 1st Sess. (1935) 38-39 ... 42

Page

H. R. Rep. No. 3184, 58 Cong. Rec., 66th Cong., 1st Sess. (1919) 2136-7 39
Idaho Code Tit. 61 40
Nevada Comp. Laws 1929, Section 6100 *et seq.* 40
Oregon Comp. Laws (ann.) Tit. 112 40
Rules of Court of Appeals (D. C. Cir.)
Rule 26(a) 18, 19, 21, 24
Rule 32(a) 18
Rule 32(b) 18, 24
Rule 32(c) 18

Sen. Rep. No. 621, 74th Cong., 1st Sess. (1935) 19..39, 41, 44, 46
13 Fed. Reg. 6214 (1948) 31
76 Cong. Rec., 72d Cong., 2d Sess., p. 5358 35

Supreme Court of the United States

October Term, 1952

No. 12

FEDERAL POWER COMMISSION, *Petitioner,*

v.

IDAHO POWER COMPANY, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR IDAHO POWER COMPANY RESPONDENT

OPINION BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 6-13) is reported at 189 F. 2d 665.

JURISDICTION

The original judgment of the Court of Appeals was entered May 10, 1951 (R. 6 and 14). On August 2, 1951 the Chief Justice of the United States by order extended the time for filing petition for writ of certiorari to October 6,

1951 (R. 128). On September 21, 1951, the Court of Appeals clarified and modified its opinion and judgment (R. 16). Petition for certiorari was not filed until December 19, 1951 and certiorari was granted on March 3, 1952 (R. 129).

Respondent contends that the petition for certiorari was neither filed within 90 days of the entry of judgment sought to be reviewed nor within the time for filing as extended by the Chief Justice, and that, accordingly, this Court is without jurisdiction to review this case. 28 USC § 2101(c). This issue is discussed under Point I, *infra*, pp. 16 to 28.

QUESTIONS PRESENTED

1. Whether the petition for certiorari was filed within the time prescribed by 28 U. S. C. § 2101(c) so as to provide this Court with jurisdiction to review on certiorari the opinion and judgment of the Court below.

2. Whether the Court of Appeals, having determined that the conditions attached by the Commission to the inclusion of transmission lines within a previously approved project were illegal and their subject matter "legislative", properly modified the Commission's order by eliminating the invalid conditions and affirming the order as thus modified without remanding the case to the Commission for further deliberation and action.

3. Whether the action of Petitioner in requiring Respondent to agree—as a condition to a license under the Federal Power Act for a hydro-electric project—to permit various agencies of the Department of the Interior to use the transmission lines, constituting a part of such project, for the transmission of Government power in competition with the Respondent, exceeds the authority granted by such Act, is arbitrary and unreasonable, and constitutes a taking of Respondent's property without due process of law.

STATUTES INVOLVED

The jurisdiction of this Court depends upon Title 28 of the United States Code, Sections 452, 1254(1), and particularly Section 2101(e), which provides as follows:

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period of not exceeding sixty days."

The only statute granting authority to the Commission to issue licenses for power projects is the Federal Power Act (49 Stat. 847 (1935), 16 U. S. C. 791a *et seq.*) particularly Section 4(e) thereof.

STATEMENT OF FACTS

On August 22, 1947, Respondent filed an application with the Federal Power Commission pursuant to Section 4(e) of the Federal Power Act for a license to construct, operate, and maintain a dam and hydroelectric power project to be known as the "Bliss Development" (R. 26-33). This project, designated by the Commission as "Project No. 1975," was to be erected on the Snake River in the south-central part of the State of Idaho. The original site of this development is shown in the enlarged section of the map attached to the back cover of the Petitioner's Brief, and is marked "August 1947 Plan (Exhibit 'J')." The application filed with the Commission did not describe in detail the proposed transmission lines which would ultimately become necessary to transmit the energy generated at the dam. It merely provided that "The plant will be connected by tap lines to the Company's 138-kv transmission network" (R. 28).[1]

[1] "Tap lines" are not defined in the Federal Power Act or in the Regulations of the Commission. The function of a tap line is

However, the general map of the project area, which was filed with this application as Exhibit "J", showed tap lines connecting the Bliss project with Respondent's Hagerman Valley-Caldwell and Hagerman Valley-Boise lines.

Shortly thereafter, on December 3, 1947, Respondent filed an amendment to the above application which effected a major change in the location of the project (R. 38-43). Such final relocation of the dam and power house is also shown in the enlarged section of the map attached to the back cover of the Petitioner's Brief as the "Nov. 1947 Plan (Exhibit 'K')." As stated in the amendment, this change in the location of the project was prompted by a report of Respondent's geologist which pointed out that the new location would be more satisfactory and provide a better development because of unfavorable geological features of the surrounding terrain at the site first contemplated.[2]

The proposed transmission lines for the project were not located or described in the amendment. Here, as in the original application, the only mention of transmission lines was the statement that "The plant will be connected by tap lines to the Company's 138-kv transmission network" (R. 38). It will also be noted from an examination of the map attached to the cover of Petitioner's Brief that the diagram of the new dam site ("Nov. 1947 Plan"), unlike the diagram of the original project, does not show any transmission lines. It merely shows two short arrows which are conventionally used in such instances, to indicate that there would be transmission lines eventually. Thus, the original application and drawings filed therewith, which showed short tap lines connecting with Respondent's

---

to transmit energy from its source of generation to a tap in the integrated transmission system or in the distribution system. The term is not indicative of the length of the line.

[2] Respondent's reason for changing the site of the project does not appear in the printed transcript. It does appear, however, in Vol. 1, p. 36 *et seq.* of the certified record. See Stipulation, R. 133.

existing system, were superseded by an amendment to the application and new maps which clearly show that the location and terminal points of the transmission lines were undetermined.

After the above application and amendment had been filed, the Federal Power Commission, pursuant to Section 4(e) of the Act, notified the Secretary of the Interior concerning Respondent's application and requested a report as to whether or not the proposed project would interfere with any *reservation* under the jurisdiction of this Department (R. 44). On February 19, 1948, the Assistant Secretary of the Interior replied to the Commission's letter and stated that "the Department has no objection to the issuance of a license to the Idaho Power Company for its proposed Bliss Project" provided certain recommendations totally unrelated to the present controversy were followed. (R. 51)[3]

---

[3] The "recommendations" referred to in the Assistant Secretary's letter were as follows:

> "(1) That the license be conditioned upon the applicant's starting construction work within one year from the date of issue of the license and upon completing construction of at least the initial generating unit *together with the necessary transmission lines* and appurtenant works within five years of the date of the license.
>
> (2) That, should the applicant determine it is damaged by subsequent upstream diversion of water by the United States in connection with its irrigation and conservation program, then the United States Government has the option, in full settlement of any and all claims by the applicant;
>
> (a) of paying such damages as the applicant shall be then entitled to recover as a matter of law; or
>
> (b) of acquiring the applicant's plant at its depreciated cost."

No mention of "wheeling" or transmission of power for the government was made or even suggested in the Assistant Secretary's letter.

(Emphasis supplied throughout this Brief, unless otherwise indicated.)

After the Commission had received the Department of the Interior's favorable commentary on this project, and after it had received similar reports from various other agencies, it issued, on March 3, 1948, an order authorizing the issuance of a major license for the construction of the project at the site specified in the amended application (R. 51-56). Contained also in this order were the formal findings of the Commission pursuant to Section 10(a) of the Act, that "the project is best adapted to a comprehensive plan for the improvement and utilization of water power development, and for other beneficial public uses . . . " (R. 53). Since neither the amendment to the application nor the new maps filed therewith indicated the location of the transmission lines, which fact was noted in the Commission's order,[4] the Commission reserved the right to determine at a later date what transmission facilities should be included in the license as part of the project (R. 55). However, no reservation was made as to any conditions to be imposed on the use of such lines.

Thus, as of March 3, 1948, Respondent had received authority to construct, operate, and maintain the Bliss Development, including such transmission lines as the Commission should determine later to be a part of the project. Pursuant to the Commission's authorization, Respondent immediately commenced construction of the project.

After the above described project had been authorized, Respondent, on or about July 9, 1948, applied to the Bureau of Land Management of the Department of the Interior for a permit to construct a transmission line over certain public lands (R. 68). The proposed line, which would ultimately be a 230-kv line, would

[4] Paragraph (3) of the Order states: "Although the application states that the powerhouse will be connected by tap lines to applicant's 138-kilovolt transmission network, neither the tap lines nor the switching station from which they emanate are shown to be within the project boundary on the maps submitted as part of the application" (R. 52).

extend generally from Boise to American Falls, Idaho. The Department, in acting on Respondent's application, apparently was influenced by a report entitled "Report on Availability of Power in Southern Idaho for Development of Phosphate Industry" which was prepared by the Bureau of Reclamation and the Bonneville Power Administration and submitted to the Department of the Interior in April of 1948 (R. 112). This report proposed that the United States construct and operate a transmission line which would connect the eastern and western parts of the southern Idaho region. In view of the suggestions contained in this report, the Department of the Interior refused to consider Respondent's application unless it agreed to allow the United States to use these lines for "wheeling" government power. In the belief that the proposed conditions were invalid and would impair the carrying out of Respondent's obligations as a public utility company in the states in which it operates, Respondent declined to subject itself to these conditions. Being unable to obtain the requested permit without the aforesaid conditions, the Respondent, on April 11, 1949, formally withdrew its application from the Department of the Interior.

In the meantime, the Bliss dam was in active construction and approaching completion. It became apparent that final determination must soon be made as to the "primary lines" (Federal Power Act, Section 3(11)) which would emanate from this plant which had been authorized *before* the Department of the Interior had adopted its "wheeling" policy and *before* any application had been made to that Department.[5] After such determination had been made, Re-

[5] The order authorizing the project was issued by the Federal Power Commission on March 3, 1948 (R. 56). The so-called "wheeling" policy of the Department of the Interior was contained in its regulations first promulgated on October 14, 1948, 13 Fed. Reg. 6214, and was amended on July 18, 1949, 14 Fed. Reg. 4620. Application for permit was made by Respondent to the Bureau of Land Management of the Department of the Interior on or about July 9, 1948 (R. 68).

spondent, on April 20, 1949, filed an "Application for Supplementary Amendments to Application for License" with the Federal Power Commission (R. 58-63). In this application, Respondent proposed to construct primary lines from the Bliss plant to Boise and American Falls, Idaho.

These were unquestionably "project" lines under the Act, and the Commission itself so recognized and adjudged them when it included them in the license as a part of the project facilities,—thus also approving the Company's plans for the transmission of Bliss power from the power plant. The necessity of additional transmission lines to carry the power from the plant (instead of merely "tapping" it into the Company's existing transmission system) is apparent from the size of the Bliss power plant, and the transmission capacity required to carry the Bliss power output to the Boise and American Falls load centers (R. 85).

Notwithstanding the statements in Petitioner's Brief to the contrary (pp. 5 and 6), Respondent's proposed project lines did not require any alterations or changes in the then specifications or plans of the project. The project, as authorized by the Commission did not purport to describe any transmission lines.[6] As shown by the record, the question of the location of the lines was, as of that time, undetermined.

After Respondent had filed its supplementary amendments setting forth the proposed primary lines, the Federal Power Commission again wrote to the Department of the Interior, pursuant to Section 4(e) of the Federal Power

---

[6] Petitioner, in attempting to show that Respondent, in effect, changed the scheme of the project because of the Department of the Interior's refusal to grant it a permit, states that the original tap lines were only six miles long and connected with certain specified transmission lines (Pet. Br. p. 5). Petitioner glosses over the fact that the location of these short tap lines as well as the location of the dam itself were completely changed by Respondent in 1947—before the project was authorized and before the Department of the Interior had adopted its "wheeling" policy.

Act, to determine whether or not the inclusion of the transmission lines would interfere with any *reservation* under the supervision of the Department (R. 66-67). Secretary Krug, in response to this letter, requested that the Commission order Respondent to show cause why its application for the inclusion of transmission lines as part of the project should not be dismissed (R. 72), on the principal grounds that Respondent's proposed lines were not primary lines as defined by Section 3(11) of the Federal Power Act, and therefore not within the jurisdiction of the Commission (R. 71).[7]

---

[7] Petitioner, in footnote 3, page 7 of its Brief, states that the Secretary of the Interior has not abandoned the position that Respondent's transmission lines are not project lines and that such lines are not under the jurisdiction of the Commission. However, this controversy has actually been resolved for the purposes of this case, at least. On October 13, 1949, the Secretary of the Interior filed a formal complaint in this matter (R. 111) praying that Respondent's application for inclusion of the transmission lines as part of the project be dismissed on the grounds, *inter alia*, that the proposed lines were not project lines. On the same day the Commission issued an order, in which it found Respondent's proposed lines to be project lines as defined by Section 3(11) of the Federal Power Act (R. 103), and authorized the inclusion of the transmission lines as part of the project. Shortly thereafter, Respondent filed a Petition for Rehearing in which it requested that the "wheeling" provisions, inserted in the 1949 order, be eliminated (R. 116-119). The Commission, in an order dated January 18, 1950, modified its earlier order *and dismissed the complaint of the Secretary of the Interior* (R. 128). The Secretary of the Interior did not seek a rehearing or review of the order dismissing his complaint, nor did he seek a rehearing of the Commission's order finding that the proposed lines were project lines. Section 313(a) of the Federal Power Act and Section 1.34 of the Commission's Rules of Practice and Procedure provide that petitions for rehearing must be filed within 30 days after issuance of the order. Section 313(b) of the Federal Power Act provides for review of Commission orders upon the filing of a petition for review within 60 days of the final order. The Secretary of the Interior, however, took no such formal steps to preserve whatever rights, if any, he may have had (see *United States, ex rel. Chapman* v. *Federal Power Commission*, 191 F. 2d 796 (4th Cir. 1951), cert. granted 343 U. S. 941).

The Respondent, however, after being apprised of the Secretary's letter, wrote a lengthy letter to the Commission fully rebutting the objections of the Secretary (R. 82-91).[8] The latter, in turn, proposed to the Commission certain "wheeling" conditions which he requested to be incorporated into the license in the event that the Commission should decide to issue the license for the project lines (R. 94-95).

Based on findings that neither line alone is capable of transmitting the entire power output of the Bliss plant, and that both lines must be used as "primary lines" comprising a necessary part of the "project" (R. 101), the Commission, on October 13, 1949, issued an order, *effective as of March 1, 1948*, authorizing the inclusion of such lines as part of the project (R. 104). This authorization, however, was subject to the conditions complained of below, and specifically states that these conditions were inserted therein at the request of the Secretary of the Interior (R. 101). These conditions, appearing under paragraph (F) of the Order (R. 107-110), require:

> (1) Upon request of the Secretary of the Interior, Respondent shall, after notice of at least one year,

---

[8] For example, the inference in paragraph 4 of the Secretary's letter that Respondent had no intention of constructing the Boise-American Falls line until it discovered that the government intended to build a similar line (R. 69) is without basis in fact. (R. 83-84). In response to the Secretary's statements that Respondent was a trespasser on government lands (because it had started construction of its proposed lines pursuant to a "pre-license permit" issued by the Commission) and that the Department of the Interior had obtained from the United States District Court for the District of Idaho, a temporary restraining order against Respondent restraining such trespass (R. 72), Respondent showed that the Secretary's accusations had no basis in law or fact and that his motion for an injunction had ultimately been denied by the Idaho District Court (R. 91). *United States* v. *Idaho Power Co.*, 85 F. Supp. 913 (D. Idaho), appeal dismissed (9th Cir. Feb. 13, 1950).

convert the project lines from operation at 138 kilovolts to operation at 230 kilovolts at the expense of the United States;

(2) After the lines have been constructed or converted to the higher voltage, Respondent shall permit the United States to interconnect any of its transmission facilities with said lines, provided there is capacity available in said lines in excess of Respondent's needs;

(3) Upon the completion of such interconnections, the United States shall have the right to transfer such amounts of energy over said lines as will "*not unreasonably interfere*" with Respondent's own use of the lines;

(4) If Respondent's capacity needs are such that it requires all or a part of the capacity then being used by the United States, it may revoke the agreement to carry federal power upon giving 30 months' notice.[9]

The order also contains other less important provisions concerning the "wheeling" of government power.

It should be noted that the government, under these conditions, would have authority to use Respondent's lines to the extent that such usage will *not unreasonably interfere with Respondent's use.* Provision F(2) of the Commission's order states that the government can interconnect with Respondent's line "provided there is capacity in said line or lines in excess of the needs of the licensee" (R. 107). However, provision F(3) states that once such interconnection is made, the United States will have the right

[9] It would appear that Respondent will not be sole judge as to when it will require additional capacity, and that the giving of a 30-month notice will not automatically oust the government from the lines, but will only constitute notice for a hearing to be had on the question. Such is the Secretary of the Interior's construction of this proviso (R. 120).

to transmit energy "in such amounts as will not unreasonably interfere with licensee's use of said lines" (R. 107). *The measure of government use is not, as Petitioner states on pages 2, 3, 9 and 10 of its Brief, measured by the "excess capacity" of Respondent's lines,* but rather it is measured by such use as will *"not unreasonably interfere"* with Respondent's operations. There is a wide and critically important difference in purport between the expressions "unused capacity" and "unreasonably interfere." The latter is indefinable on any practicable operating basis.

On the same day that the Commission authorized the inclusion of transmission lines as part of the project, the Secretary of the Interior filed a formal complaint in this matter praying that Respondent's application be dismissed (R. 111-115).[10] Shortly thereafter, Respondent filed with the Commission a Petition for Rehearing requesting *inter alia,* that the "wheeling" provisions be stricken from the order (R. 116-119). On January 18, 1950, the Commission issued a modifying order whereby the notice period for recovering full capacity of the project lines was reduced from 30 months to 24 months (in itself a recognition of the importance in public utility operation of the time element involved). In this order, the Commission also denied Respondent's petition for rehearing and dismissed the formal complaint of the Secretary of the Interior (R. 127).

On February 7, 1950, Respondent filed with the Court of Appeals for the District of Columbia Circuit a Petition for Review pursuant to Section 313(b) of the Federal Power Act and Section 10 of the Administrative Procedure Act, 60 Stat. 243 (1946), 5 U.S.C. § 1009. The Court of Appeals held that the Federal Power Commission was without statutory authority to prescribe the "wheeling" conditions contained in paragraph (F) of its order and that the order must be modified accordingly, *Idaho Power Co. v. Federal Power Commission,* 189 F. 2d 665 (1951). This Court granted certiorari on March 3, 1952 (R. 129).

---

[10] See footnote 7.

SUMMARY OF ARGUMENT

Petitioner did not file with this Court a petition for certiorari within the time prescribed by law. Although Petitioner after judgment, filed in the Court of Appeals, a "Motion for Clarification of Judgment", and that court acted on this motion, an examination of its form and content indicates that it requested only a formal change in the judgment. Accordingly, since it did not seek to alter the rights adjudicated or affect the substance of the case, it did not suspend the finality of the judgment. Thus, upon expiration of the time as extended by the Chief Justice of this Court on October 6, 1951, the time in which to petition for certiorari had expired.

However, even if Petitioner's motion did affect the substantive rights adjudicated, it would operate to extend the time for filing a petition for certiorari only if it were timely. Petitioner's motion was filed sixty-seven days after entry of judgment—long after the time limitation set for such motions by the Rules of the Court of Appeals. The precedents of this Court are clear that, except in bankruptcy matters, an untimely motion after judgment does not affect the time for appeal even if it purports to affect the substance of the case. This is true in the Court of Appeals as well as in the District Court since the rules of both courts limiting the time within which a judgment can be reconsidered have the effect of law. If the rule were otherwise, a litigant could, as Petitioner now attempts, control and extend indefinitely the time for filing a petition for certiorari.

The court below properly eliminated the invalid conditions without remand to the Commission. The Commission's 1948 order was founded on all necessary statutory prerequisites and authorized the license for the project as a whole (other than transmission lines) entirely independent of the invalid conditions not then before the Commission. The invalid conditions, attached in 1949, with respect to

the inclusion of transmission lines within the project, were properly found by the Court to relate to a separate and distinct subject matter: required interconnection of public and private transmission facilities and compulsory transmission of public power by private companies. Conditions dealing with this subject matter were properly found by the Court to be not only unauthorized, but actually prohibited by the Act and to be of *legislative* rather than administrative concern. Accordingly, the invalid conditions were necessarily separate and distinct not only from the order authorizing the projects as a whole, but also from the determination of "what" transmission lines" were includible in the project. With the invalid conditions eliminated, the Commission's order was then complete in its conformance to statutory requirements and further consideration of the "legislative problem" to which the conditions related would have been manifestly improper.

Petitioner's brief on the merits is based on a mistaken application of the doctrine that the United States, in its sovereign capacity as the owner of the public lands, can condition permission to use such lands as it sees fit. Nowhere in this proceeding has Respondent questioned the authority of the *United States* to impose conditions or restrictions upon the use of its lands, or to appropriately delegate such authority.

The essence of the Respondent's case is that the Federal Power Commission has not had conferred upon it the authority to impose the conditions herein complained of; on the contrary, Congress has made its intent clear to withhold such power from the Petitioner.

The legislative history of the Petitioner's organic statute reveals that Congress considered, in 1919 (as to the original Federal Water Power Act, now Part I), and in 1935 (as to "this Act" as a whole) proposals to require subject companies to serve as common carriers, and that such proposals were rejected. Congress also considered the question of electric public service companies being required under the

Act to carry power generated by federal and municipal plants, and added a new subsection in 1935 to make clear that such was not the legislative intent.

The Federal Power Act is a single unit composed of three interrelated parts. The contention that the Act can be treated as separate units, each standing alone as if the other parts had never been enacted, is rebutted by the history of the Federal Power Act, the method of its enactment and the manifest interrelation of its parts.

No other statute lends support to Petitioner's unauthorized action. The powers of the Department of the Interior are limited in this matter solely to the protection and utilization of any reservation under its control. Petitioner has not seriously argued that this limited interest of that Department in any way provides the necessary authority for these conditions.

The authority which the Commission seeks to invoke has never been exercised in its thirty years of existence. Petitioner's assertion that it never had need for such conditions in the past is rebutted by the fact that public power has been a major governmental function for well over a decade. The Commission is, in effect, legislating in a field which has been knowingly and specifically withheld from its jurisdiction. The effect of this legislative action is to impose upon Respondent conditions which are totally arbitrary and unreasonable and constitute a seizure of its property without authorization of Congress.

In essence, Petitioner's problem is inherently legislative. "If the Commission believes it to be in the public interest to prescribe such a condition upon power project licenses, it should present its views to the Congress" (R. 13).

ARGUMENT

I

This Court Does Not Have Jurisdiction to Review This Case Because the Petition for Writ of Certiorari Was Not Filed Within the Prescribed Time.

Certiorari was granted to Petitioner in this case under Section 313(b) of the Federal Power Act (16 USC § 825l) and 28 USC § 1254(1). It is provided in 28 USC § 2101(c) that petitions for writs of certiorari must be applied for within ninety days after entry of the judgment or decree sought to be reviewed, unless extended by this Court for a period of not exceeding sixty days. If the petition is not filed within the prescribed time, the Court does not have jurisdiction to entertain it. *Hope Basket Company* v. *Product Advancement Corp.*, 324 U. S. 833 (1951); *Department of Banking* v. *Pink*, 317 U. S. 264 (1942).

Respondent respectfully submits that Petitioner did not file its petition for a writ of certiorari within the time prescribed by law and that this Court is without jurisdiction to entertain this case.[11]

The opinion and judgment of the Court of Appeals were filed and entered on May 10, 1951 (R. 6 and 14). Sixty-seven days thereafter, on July 16, 1951, the Commission filed a "Motion for Clarification of Judgment" (R. 15), and *subsequently* made a timely application to this Court for an extension of time within which to file a petition for certiorari. This application was granted, and the time for such filing was extended to October 6, 1951 (R. 128). No further extension of time to apply for certiorari was, or could have been, granted under 28 USC § 2101(c). On September 21, 1951, fifteen days *before* the expiration of the

---

[11] *Forsyth* v. *City of Hammond*, 166 U. S. 506, 511 (1897): "It may be that the question of propriety should be considered as foreclosed by the action of the Court in awarding the writ of certiorari, but *the question of power, being one of jurisdiction, is always open, and must whenever presented be considered and determined.*"

extended period for filing certiorari, the Court of Appeals clarified its judgment of May 10, 1951 (R. 16). However, the Petitioner did not file its petition for certiorari within the period as extended by the Chief Justice of this Court. The Petition was not filed until December 19, 1951, 74 days after the expiration of the extended period, and 232 days after the entry of judgment.

Petitioner contends (in its Reply Brief on certiorari, pp. 1 and 2) that the time for filing its petition for certiorari was tolled by the filing of the "Motion for Clarification" and that the ninety-day period did not start to run until after the Court of Appeals entered its "clarifying" order on September 21, 1951. We submit that the Motion for Clarification and the action of the Court of Appeals thereon did not suspend the period during which the Petitioner was obligated to file its petition. Since the petition was not filed within the period as extended by this Court, it was untimely and of no avail.

A. A motion for mere formal changes in judgment does not toll the time for appeal.

A timely petition for rehearing tolls the running of a statutory limitation and the time to seek review, since it operates to deprive a judgment of the finality which is essential to appealability. *Denholm & McKay Co.* v. *Commission of Internal Revenue*, 132 F. 2d 243, 247 (1st Cir. 1942). But this doctrine is applicable only where such petitions seek a "reconsideration of * * * basic findings * * * and the alteration of the conclusions of the Court," so that, if granted, "rights already adjudicated [will] be altered." *Leishman* v. *Associated Wholesale Electric Company*, 318 U. S. 203, 205 (1943); cf. *Zimmern* v. *United States*, 298 U. S. 167 (1936). Thus, it is well established that the reentry of a final judgment with only formal changes not affecting any matter adjudicated does not enlarge the time to seek review. *Department of Banking* v. *Pink*, 317 U. S. 264 (1942).

Petitioner's Motion for Clarification was filed on July 16, 1951, sixty-seven days after entry of the opinion and

judgment and *fifty-two days after expiration of the time for filing a Petition for Rehearing*, nor was such time "enlarged by the court or a judge thereof" (Rule 26(a) of the General Rules of the United States Court of Appeals for the District of Columbia Circuit).[12] Enlargement of the 15-day period within which to file Petitions for Rehearing can only be granted, *after* the expiration of such period, "for cause shown * * * where the failure to act was the result of excusable neglect," Rule 32(b), *ibid.*[13] Petitioner's

---

[12] The text of this rule provides:

Rule 26—Rehearing

"(a) *Petition.* A petition for rehearing may be filed with the Clerk, when accompanied by proof of service on the adverse party, within fifteen days after judgment or decision, unless the time is shortened or enlarged by the court or a judge thereof. Such petition must be printed and signed and forty copies thereof furnished. It must briefly and distinctly state its grounds, and be supported by a certificate of counsel to the effect that it is presented in good faith and not for delay. A petition for rehearing is not subject to oral argument, unless ordered by the court."

[13] The full text of Rule 32 is as follows:

"(a) *Computation.* The computation of any period of time specified by these rules shall be governed by Rule 6(a) of the Federal Rules of Civil Procedure.

(b) *Enlargement.* When by these rules or by order of this court an act is required or allowed to be done at or within a specified time, the court or a justice thereof for cause shown may (except where the time is also fixed by statute), at any time in the discretion of the court or a justice thereof, (1) upon motion order the period enlarged if application thereof is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion permit the act to be done after the expiration of the specified period where the failure to act was the result of excusable neglect.

(c) *Reducing time periods.* The court on motion or *sua sponte* may by order in any cause reduce the time period fixed by the rules of this court for doing any act, whenever it appears in the interests of justice to do so."

Motion did not set forth any "cause" for late filing, and since the Court's order of September 21, 1951 is similarly devoid of any finding of "excusable neglect," it is apparent that neither the Court nor Petitioner considered the Motion to be a petition for rehearing authorized by Rule 26(a).[14] Cf. *United States* v. *Seminole Nation*, 299 U. S. 417, 420-421, (1937).

Moreover the Motion did not request reargument or reconsideration by the Court of any substantive issue previously adjudicated. No error in the Court's conclusions of law was alleged, and no modification of any such conclusion was proposed, (R. 16). The Court was merely asked for advice or to restate in different words what it had already decided. Here, as in *Department of Banking* v. *Pink*, 317 U. S. 264, 266:

> "* * * the motion did not seek a reargument or rehearing of any part of the case; *it was no more than a request that the Court of Appeals declare what had in fact occurred upon its previous decision of the case.* * * *
>
> "* * * Unlike a motion for reargument or rehearing, it did not seek to have the Court of Appeals reconsider any question decided in the case. The final judgment already rendered was not challenged; * * *.
>
> "* * * Here no such alteration of the rights adjudicated was asked, and the finality of the court's first order was never suspended."

Petitioner, initially at least, must have shared our contention that the Motion did not purport to affect the substance of the case, since subsequent to the filing of that Motion it applied to this Court for an extension of time in which to file a petition for certiorari.* *This action would obviously have been unnecessary if Petitioner considered*

[14] Petitioner's failure to file in the Court of Appeals forty printed copies of its Motion for Clarification and "a certificate of counsel to the effect that it is presented in good faith and not for delay," as required by Rule 26(a), constitutes further evidence that it did not consider such Motion a Petition for Rehearing.

this Motion as one tolling the time for filing its petition for Certiorari.

Petitioner, however, *now* contends (Pet. Reply Br. on certiorari, p. 3) that the *effect* of the order issued pursuant to its Motion actually altered the substance of the judgment. It is asserted that under the original judgment, the Commission apparently had power on remand to reconsider Respondent's application for a license, whereas under the clarified judgment, the Commission was precluded from such reconsideration. This assertion is completely groundless.

The judgment of the Court of Appeals, filed on May 10, 1951, reads as follows (R. 14):

> "On consideration whereof, It is ordered, adjudged and decreed by this Court that the order of the said Federal Power Commission on review in this cause be modified, and that this cause be, and it is hereby, remanded to the Federal Power Commission for the entry of an order *in accordance with the opinion of this Court.*"

If there were any ambiguity in the judgment itself, it was dispelled by the incorporation of the undeniably clear directives of the opinion. "A direction for proceedings in accordance with 'the opinion' makes it part of the mandate," *Rogers* v. *Hill*, 289 U. S. 582, 587 (1933). See also *Gulf Refining Co. v. United States*, 269 U. S. 125, 136 (1925).

The case was remanded only for the ministerial act of entering an order. Nowhere is there an indication that the Commission will have any function other than ministerial. Further proceedings were not directed; the taking of additional evidence was not prescribed; a reconsideration was not to be had.

It follows, therefore, that the Court's purely formal action in rewording the language of a portion of its opinion and judgment did not operate to enlarge the time for filing a petition for certiorari in the instant case.

B. Even if the motion is construed as a motion affecting the substance of the judgment, it was untimely and therefore did not toll the time for appeal.

Even if the Motion were a "motion for reargument or rehearing," seeking "an alteration of the *rights* adjudicated,"[15] such motion, as we have pointed out above, was untimely under the Court of Appeals' Rule 16. Unlike a *timely* petition for rehearing, the filing of an untimely petition for rehearing does not enlarge the time for appeal, *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498 (1927) and *Morse* v. *United States*, 270 U. S. 151, 154 (1926), where this Court said:

> "The suspension of the running of the period limited for the allowance of an appeal, after a judgment has been entered, *depends upon the due and seasonable filing of* the motion for a new trial or *the the petition for rehearing.*"

To rebut this contention of Respondent, Petitioner, in its Reply Brief on certiorari, page 2, cited the cases of *Bowman* v. *Loperena*, 311 U. S. 262 (1940), and *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144 (1942), holding that if an untimely petition for a rehearing is "entertained" on the merits, the time for appeal is suspended. However, both of these cases involve questions of bankruptcy and the novel characteristics of the Court of Bankruptcy. That Court, by the nature of its functions, must maintain continued control over the debtor and be free to modify its actions as circumstances change, as the Notes of Advisory Committee on Rules show (Annotations to Rule 73 of the Federal Rules of Civil Procedure appearing in 28 U.S.C.A., p. 430):

> "In bankruptcy proceedings it is established that as the bankruptcy court has no terms it has the power *at any time* for good reason to revise its judgments or

---

[15] *Department of Banking* v. *Pink*, 317 U. S. 264, 266 *supra*, p. 19.

orders upon seasonable application and before rights have vested on the faith of its action. A motion so to do may be entertained *even after the expiration of time for appeal,* and such appeal time will start running anew upon the disposition of the motion. Wayne United Gas Co. v. Owens-Illinois Glass Co., 1937, 57 S. Ct. 382, 300 U. S. 131, 81 L. Ed. 557; Bowman v. Loperena, 1940, 61 S. Ct. 201, 311 U. S. 262, 85 L. Ed. 177; Pfister v. Northern Illinois Finance Corp., 1942, 63 S. Ct. 133, 317 U. S. 144, 87 L. Ed. 146; Chapman v. Federal Land Bank, C.C.A. 6, 1941, 177 F. 2d 321; State of Missouri v. Todd, C.C.A. 8, 1941, 122 F. 2d 804. In *ordinary civil actions* governed by the Federal Rules of Civil Procedure, however, the *better view is that when the time limits prescribed in the rules expire, the court loses its jurisdiction* to entertain a motion, as for new trial or for a rehearing or to vacate or amend, as the case may be, *and cannot thereafter entertain such a motion* and thereby start the appeal time running anew. Safeway Stores, Inc. v. Coe, App. D. C. 1943, 136 F. 2d 771; Jusino v. Morales & Tio, C.C.A. 1, 1944, 139 F. 2d 946; Nealon v. Hill, C.C.A. 9, 1945, 149 F. 2d 883; Norris v. Camp, C.C.A. 10, 1944, 144 F. 2d 1. It has been said that *the bankruptcy rule,* stated supra, *is to be distinguished as based on the distinctive nature of bankruptcy proceedings; and that since the Federal Rules have abolished terms and substituted therefor various definite time limits,* the same rule should be applied when such time limits expire as was applied formerly when terms were effective. Safeway Stores, Inc. v. Coe, supra. See also discussion of these distinctions in Oglebay, Some Developments in Bankruptcy Law, 1946, 20 J. of Nat'l Ass'n of Ref. 76, 80."

The rationale of the holdings in the cases referred to above in the Advisory Committee's notes as expressing "the better view" is well set forth in the opinion of the Court of Appeals for the District of Columbia Circuit in *Safeway Stores, Inc.* v. *Coe,* 136 F. 2d 771 (D. C. Cir. 1943), where the court said at page 775:

"Rule 6(c) now abolishes the effect of the expiration of the term on the power of the court to act, Rule

59(b) provides a definite time within which a motion for new trial may be made, and Rule 6(b) forbids the Court to enlarge that time. *If it were not thereby intended to make the running of that definite time as conclusive on the power of the Court as was formerly the expiration of the term, there would be no limit on the power of the Court to act and no finality when it did act.* A construction which would empower the Court to hear motions long out of time would destroy the rule for by the very act of hearing, prohibited extensions could effectively be granted."[16]

The Seventh Circuit, since the publication of the Advisory Committee's notes, has also adopted the limitation proposed in the *Safeway* case. In *Fine* v. *Paramount Pictures*, 181 F. 2d 300 (7th Cir. 1950), the court said at page 304:

> "A trial court by assuming to hear and determine a belated motion for a new trial cannot thereby affect the finality of the judgment or enlarge the time for taking an appeal. *Safeway Stores* v. *Coe*, 78 U. S. App. D. C. 19, 136 F. 2d 771, 184 A.L.R. 182."

Further, since that time, the Ninth Circuit has strictly applied the same principle with respect to the substantially identical provisions of Rule 47 of the Federal Rules of Criminal Procedure. *Marion* v. *United States*, 171 F. 2d 185, 186 (1949), *cert. denied*, 337 U. S. 944, which held as to a motion for new trial, made more than five days after verdict, that: "The motion having been filed too late the court was without jurisdiction to entertain it."

---

[16] *Nealon* v. *Hill*, 149 F. 2d 883 (9th Cir. 1945), cert. denied 326 U. S. 753, also referred to in the Advisory Committee's notes specifically held at p. 885:

> "Not having been seasonably filed, the petition did not enlarge or extend the time for appeal. *Morse* v. *United States*, 270 U. S. 151, 46 S. Ct. 241, 70 L. Ed. 518. This is a civil action and not a petition in a bankruptcy proceeding, and therefore *Wayne United Gas Company* v. *Owens-Illinois Glass Co.*, 300 U. S. 131, 57 S. Ct. 382, 81 L. Ed. 557, and *Bowman* v. *Loperena*, 311 U. S. 262, 61 S. Ct. 201, 85 L. Ed. 177, relied upon by appellant *are not in point.*"

It should be noted in this respect that the term of court doctrine limiting motions after judgment has been abrogated in the Court of Appeals as well as in the District Court. 28 USC § 452. Consequently, if, as the above cases hold, there is need for a definite limitation on motions after judgment in the District Court, there is an equivalent need for such a limitation in the Court of Appeals. If in the District Court strict compliance with Federal Rule 59(b) is required (limiting motions after judgment to 10 days after entry), so also in the Court of Appeals the same reasoning compels strict compliance with the rules of that court governing motions after judgment there.

This concept is reflected in the present language of Rule 32(b) of the Rules of the Court of Appeals for the District of Columbia Circuit, which is substantially identical with Rule 6(b) of the Federal Rules of Civil Procedure.[17] It provides that the Court may permit an act to be done after the expiration of a specified period, *only* upon a motion showing that "the failure to act was the result of excusable neglect." No such showing was made by Petitioner as to why it filed its Motion for Clarification 67 days after judgment, instead of within the 15 days prescribed by Rule 26(a), the *only* rule of the Court of Appeals authorizing motions after judgment. We therefore submit that the Court of Appeals could *not, as a matter of law,* have treated the Motion for Clarification as a Petition for a Rehearing, or one for any kind of relief that would toll the running of the time for taking an appeal, because the Rules

---

[17] One very important difference does exist between the two rules. Court of Appeals Rule 32(b), in contrast to Rule 6(b) and Rule 73(a), would permit a proper showing of "excusable neglect" to extend the time for taking an appeal from that Court. This extension of the concept of "excusable neglect" provides even a greater safeguard against harsh results than the 1948 Amendments to the Federal Rules (see *Hill v. Hawes*, 320 U. S. 520 (1944) and the annotations to Rule 73 of the Federal Rules of Civil Procedure, 28 USCA at p. 429, relating thereto).

of that Court "have the force and effect of law" and are as binding on the Court as on any litigant, *Bradley* v. *Pace*, 183 F. 2d 806, 807-808 (D.C. Cir. 1950).

Any other construction would leave the finality of judgments forever uncertain. Such a result applied to non-bankrupty cases, where the litigants have no continuing relationship to the court, is palpably unjust, as was clearly recognized by this Court in *Matton Steamboat Co.* v. *Murphy*, 319 U. S. 412, 415 (1943):

> "The purpose of statutes limiting the period for appeal is to set a definite point of time when litigation shall be at an end, unless within the time prescribed application has been made; and if it has not, *to advise prospective appellees that they are freed of the appellants' demands.* Any other construction of the statute would defeat its purpose."

We therefore submit that the rationale of the *Safeway* case opinion and the other Court of Appeals decisions cited above, of strict compliance with definite limitations after judgment, should be applied in *non-bankruptcy* cases emanating from the Courts of Appeal.

C. Petitioner has not sustained the burden of showing affirmatively that this Court has jurisdiction.

Even under Petitioner's theory of the jurisdictional issue, that the *Loperena* and *Pfister* cases are applicable here, petitioner still must show that its untimely motion was entertained on the merits. The only way, of course, to determine whether or not petitioner's motion was so entertained is to examine the order issued pursuant to the motion. "Whether the time for appeal would be enlarged or not would depend on what the order showed the court did.", *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144, *supra*, page 151.

> "[If the] * * * court merely considers whether the petition sets out, and the facts if any are offered sup-

port, grounds for opening the original order and determines that *no grounds for a reexamination of* the *original order are shown*, the hearing upon or examination of the grounds for allowing a rehearing *does not enlarge the time for review* of the original order * * * " (*ibid.*, p. 150).

Here the Court of Appeals, without opinion, merely amended the opinion and judgment as of *May 10, 1951* (R. 18). Like the original, the amended judgment bears the Clerk of the Court's stamp "Filed May 10, 1951", entirely contrary to its normal practice in disposing of Petitions for Rehearing, to enter an entirely new opinion and judgment where modifications of substance have been ordered upon a reconsideration of the merits. See *Mayflower Hotel Stockholders Protective Committee* v. *The Mayflower Hotel Corporation*, 193 F. 2d 666 (D. C. Cir. 1951), where the court, presented with a matter of substance on a Motion for Clarification, dismissed the motion and, *sua sponte*, ordered a rehearing on the merits.

Further, there is nothing in the record to indicate that the Court of Appeals ever reconsidered, as a proposition of law, its power to modify, and affirm as modified, Petitioner's original order. It therefore appears that the court below "determine[d] that no grounds for reexamination of the original order [were] shown," *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144, at 150, and that Petitioner's Motion for Clarification, if it sought a readjudication on the merits, was never "entertained". Thus, Petitioner has not sustained the burden of showing "affirmatively" that this Court has jurisdiction, *Memphis Natural Gas Co.* v. *Beeler*, 315 U. S. 649, 651 (1942) and *Lynch* v. *People of New York ex rel. Pierson*, 293 U. S. 52 (1934).

Nor can the Petitioner claim that dismissal of the writ of certiorari, under the circumstances of this case, would be a harsh result. Petitioner and its counsel must have been aware of the risks involved even in its own theory of this jurisdictional issue. As this Court pointed out in

Wayne United Gas Co. v. *Owens Co.*, 300 U.S. 131, 137 (1937), *supra*, p. 23, also a bankruptcy case:

> "A defeated party who applies for a rehearing and does not appeal from the judgment or decree within the time limited for so doing, *takes the risk that he may lose his right of appeal*, as the application for rehearing, if the court refuse to entertain it, does not extend the time for appeal."

Prudence would seem to have dictated the preparation of at least a draft petition for certiorari and brief at some time during the 67 days (see *Commissioner of Internal Revenue* v. *Bedford's Estate*, 325 U.S. 283, 288 (1945)) the Court of Appeals had the motion for clarification under consideration.[18] Even if that precaution were not taken, Petitioner still had 15 days after the entry of the Court of Appeals clarifying order on September 21, to file a petition for certiorari before the termination of the statutory period, as extended by the order of the Chief Justice, on October 6, 1951. Hence, Petitioner was not in the unfortunate situation of the appellants in *Klein's Outlet* v. *Lipton*, 181 F. 2d 713 (2d Cir. 1950) cert. denied, 340 U.S. 833 (1950), where a motion for reargument was still under advisement by the District Court when the time for appeal under the Bankruptcy Act expired. However, even if we should apply here a hypothetical relaxation of "the rule of the *Wayne* case to the extent of deducting from the time elapsing between the entry of a judgment and the taking of an appeal the period during which the court holds under advisement the motion for reargument," *Klein's Outlet* v. *Lipton*, at p. 714, it would not save the present petition for certiorari. Deducting the 67 days the Court of Appeals held the motion for clarification under advisement from the total of 232 days between the date of the original judgment, May 10, and the date when the Petition for Certiorari was actually filed, December 19, 1951, Petitioner would still be 165 days late. Or to take another hypothetical assumption, deduct-

[18] Cf. *Petition of Schuette*, 178 F. 2d 920 (2d Cir. 1949).

ing the 67 days the motion for clarification was under advisement from the period of the extended date for filing the petition for certiorari, October 6, to the actual filing date of December 19, 1951, Petitioner would have been 7 days late. As the 2d Circuit held in the *Klein's Outlet* case, 181 F. 2d at p. 715, "Under either view the appeal was untimely. Accordingly it must be dismissed."

For the foregoing reasons it is respectfully prayed that this court dismiss the writ of certiorari for lack of jurisdiction.

II.

The Modification of the Order of the Federal Power Commission Without Remand Was Entirely Appropriate

Petitioner contends that an exercise of the Commission's judgment is required by statute (Pet. Br. 18-21); that this judgment cannot be exercised by the reviewing court (Pet. Br. 21-27); and that a remand is required unless the agency clearly manifests its intention to permit the modified order to stand (Pet. Br. 27-31).

Respondent does not disagree with these principles and it is apparent that the Court of Appeals for the District of Columbia Circuit correctly applied them to the facts of this case.

This case is not one in which the administrative order is based on no findings at all[19] or in which Respondent has failed to utilize or exhaust its administrative remedies before resorting to the courts.[20] Nor is this a case in which

---

[19] *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 431-433 (1935); *Florida* v. *United States*, 282 U. S. 194, 215 (1931); *Mahler* v. *Eby*, 264 U. S. 32, 43-45 (1924); *Wichita R. R.* v. *Public Utilities Commission*, 260 U. S. 48, 59 (1922), and the dissent in *United States* v. *Chicago M. St. P. & P. Ry. Co.*, 282 U. S. 311, 342-344 (1931) (Pet. Br. 20-21).

[20] *Far East Conference* v. *United States*, 342 U. S. 570 (1952); *Tank Car Corporation* v. *El Dorado Terminal Co.*, 308 U. S. 422, 432-433 (1940) and *St. Louis, Brownsville & Mexico Ry. Co.* v. *Brownsville Navigation District*, 304 U. S. 295, 301 (1938). (Pet. Br. 22).

Respondent has petitioned the Court to exercise the legislative function of rate-making.[21] Admittedly, if this case did fall into any of these categories, the lower court would clearly have erred in not remanding the case for further administrative determination.

That administrative orders can on occasion be modified by the judiciary without the necessity of remand and further agency deliberation is confirmed by the many decisions of this Court, as well as those of the lower federal courts and is conceded by Petitioner (Pet. Br. 29). For example, a cease and desist order issued by the National Labor Relations Board was limited, and enforced as limited, by this Court in *National Labor Relations Board* v. *Express Publishing Company*, 312 U. S. 426 (1941) (Pet. Br. 28). On another occasion this Court struck an invalid condition from an order of the Interstate Commerce Commission and enforced the order as modified, *United States* v. *Chicago, Milwaukee, St. P. & P. Ry. Co.*, 282 U. S. 311 (Pet. Br. 21, 28) and see p. 34, *infra*. In still another instance, an order of the National Labor Relations Board was enforced by the court notwithstanding the fact that the situation had materially changed since the original order was issued and that the issue to be decided was admittedly one normally heard in the first instance by the administrative board, *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 331 U. S. 416 (1947). Similarly, an order of the Federal Trade Commission was substantially modified by this Court and enforced as modified in *Federal Trade Commission* v. *Beech Nut Packing Co.*, 257 U. S. 441 (1922).[22]

---

[21] *Southern Ry. Co.* v. *Tift*, 206 U. S. 428, 437-438 (1907); *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426, 448 (1907); *United States* v. *Interstate Commerce Commission*, 337 U. S. 426, 437 (1949); and *United States* v. *Jones*, 336 U. S. 641, 652-653, 670-671, 672-673 (1949) (Pet. Br. 22).

[22] See also *Alberty* v. *F. T. C.*, 182 F. 2d 36 (D. C. Cir. 1950), cert. denied 340 U. S. 818; *Gimbel Bros. Inc.* v. *F. T. C.*, 116 F. 2d 578 (2d Cir. 1941); *Belmont Laboratories*, 103 F. 2d 538 (3d

Petitioner concedes (Pet. Br. 29) that if it is clear that the Commission would have authorized the license without the conditions, the order may stand as modified by the Court of Appeals.

The significant factor in this case is that all findings prerequisite to the issuance of a license were made by the Commission on March 3, 1948,[23] before the invalid condi-

---

Cir. 1939); *Century Metalcraft* v. *F. T. C.*, 112 F. 2d 443 (7th Cir. 1942); *N. L. R. B.* v. *Walt Disney Productions*, 146 F. 2d 44 (9th Cir. 1945); *Educators Assn.* v. *F. T. C.*, 108 F. 2d 470 (2d Cir. 1940); *Folds* v. *F. T. C.*, 187 F. 2d 658 (7th Cir. 1951); *Joy Silk Mills* v. *N. L. R. B.*, 185 F. 2d 732 (D. C. Cir. 1950), cert. denied 341 U. S. 914.

[23] The order of March 3, 1948 (set forth in full in printed transcript, pp. 51-56) includes, among others, the following findings:

"(11) No conflicting application is before the Commission.

(12) Public notice has been given as required by the Federal Power Act.

(13) The project does not affect any Government dam, nor will the issuance of a license therefor as hereinafter provided affect the development of any water resources for public purposes which should be undertaken by the United States itself.

(14) The issuance of a license as hereinafter provided will not interfere or be inconsistent with the purpose of any reservation or withdrawal of public lands of the United States.

(15) Under present circumstances and conditions and upon the terms hereinafter imposed, the project is best adapted to a comprehensive plan for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes.

(16) The horsepower capacity hereinafter authorized to be installed in the project is 130,000 horsepower, and the energy generated thereby will be used for public-utility purposes.

(17) In accordance with Section 10(d) of the Act, the rate of return upon the net investment in the project and the proportion of surplus earnings to be paid into and held in amortization reserves are reasonable as hereinafter specified.

tions complained of were even proposed as regulations of the Department of the Interior (October 14, 1948, 13 Fed. Reg. 6214). By the time the Commission issued its superseding order of October 13, 1949 authorizing the inclusion of transmission lines as part of the approved project, the Commission was able to note in its order that the construction of the power plant was "practically completed so that within a relatively short time the first three units will be ready for operation." (R. 101).

The original 1948 order of the Commission authorizing the issuance of the license reserved for later determination "what transmission facilities should be included in the license as part of the project." (R. 55). After that later determination was made, the Commission's 1949 order was complete as to what transmission facilities were includible in the project without reference to the invalid conditions.

Petitioner now contends (Pet. Br. 20) that the order authorizing the license should have been remanded to the Commission in order that it could determine whether the project, independent of the invalid conditions, *continued* to be "best adapted to a comprehensive plan * * * for the improvement and utilization of water power development, and for other beneficial public uses." (Section 10(a)).

As the 1948 order of the Commission found the project as a whole to be fully consistent with the requirements of Section 10(a), the only part of the project that was not expressly found to be consistent with the requirements of Section 10(a) was "what transmission facilities were to be included in the project."[24]

---

[24] The phrase "what transmission facilities" clearly connotes their location, termini, capacity, constituent materials, design and other purely physical characteristics, solely for one purpose—to insure an adequate outlet for the energy generated by the project theretofore approved. It obviously does not comprehend details of operation, relationships with competitive power producers, finan-

The Court of Appeals expressly held that the terms of Section 10 "cannot be construed to require the interconnection of private facilities with public facilities and the compulsory transmission of public power by a private company * * *. The problem which is presented to us in this case is essentially a legislative problem," 189 F. 2d 665, 670.

Having found that the conditions attached to the order were in no wise authorized by Section 10, and that the problem to which the conditions related was *legislative* rather than *administrative*, no modification of the order *could* have been authorized by the Commission pursuant to Section 10(a). That section of the statute authorizes modification of the project *only* "if necessary in order to secure the plan." But the Court had found that the problem to which the conditions related could not be given any administrative consideration whatsoever as part of such a plan. Accordingly, the deletion of the conditions could not have altered the finding of the Commission that the project was "best adapted to a comprehensive plan for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes." By the same token the deletion of the conditions could not provide a basis for modification of any of the project plans.

Petitioner argues (Pet. Br. 29) that the action of the Court would deprive the Secretary of the Interior of the opportunity of presenting to the Commission his objections to the grant of a license without such conditions. The opinion of the Court of Appeals, 189 F. 2d 665, however,

---

cial adjustments between the parties, or commitments to devote a licensee's property to the use of competitors without possibility of recovery of the licensee's possession, except on 24 months' notice, irrespective of the intensity of its need.

holds that the entire question to which the conditions relate —required interconnection of private facilities with public facilities and compulsory transmission of public power by a private company—is *inappropriate for administrative action.* The problem "is essentially a *legislative* problem" and the forum for the presentation of such views is the Congress.

This is in direct contrast to the cases cited at page 23 of Petitioner's Brief in which remand was ordered in the light of what Petitioner calls "changed circumstances." In each of these cases further consideration was required to be given to matters which were concededly *administrative* in nature.[25]

---

[25] In *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37 (1948), this Court held that two provisos contained within the FTC order were invalid and permitted that Commission to refashion such provisos which related to "the very fact questions of injury to competition, etc., which the act requires the Commission to determine as the basis for its order" (at p. 54). In *Siegel Co.* v. *Federal Trade Commission*, 327 U. S. 608 (1946), and in *Federal Trade Commission* v. *Royal Milling Co.*, 288 U. S. 212 (1933), this Court ordered remand so that the Commission could give consideration to alternative remedies for eliminating an unfair trade practice which the Commission was charged with preventing. In *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134 (1940), this Court held that a judicial mandamus order requiring the FCC to give prior consideration to an applicant in whose first application legal error was contained was invalid in that it would have added a priority to the statute which was not otherwise present. In *Ford Motor Co.* v. *National Labor Relations Board*, 305 U. S. 364 (1939), proceedings were remanded "to the end that valid and essential findings may be made" (at p. 373). Remand was required in *Addison* v. *Holly Hill Co.*, 322 U. S. 607 (1944) for promulgation of a valid and necessary definition of "area of production" for it was held that to delete the invalid definition from the statutory exemption would be to "fly in the face of congressional purpose" (at p. 620).

And where this Court has determined that separable conditions are *legislative* in character, it has done exactly the same thing as the court below—affirmed the agency's order after the illegal conditions were set aside. In *United States* v. *Chicago, M., St. P. & P. R. Co.,* 282 U. S. 311 (Pet. Br. 21, 28), involving an attempt by the Interstate Commerce Commission to condition the issuance of securities, this Court said at pp. 324 and 331:

> "The power to impose such conditions, however, is not unlimited and may not be exercised arbitrarily or (since Congress cannot delegate any part of its legislative power except under the limitation of a prescribed standard . . .), unless there be found substantial warrant for the conditions in the applicable standards established by the provisions of the act . . .
>
> "The order in itself, being complete and self-sustaining and resting upon grounds found to be sufficient to support it, cannot be made to depend upon submission to a collateral condition, which, as we have shown, is beyond the statutory and constitutional power of the commission to impose . . .
>
> "From the foregoing it results that the condition in respect of the special fund of $1.50 per share was properly set aside . . .
>
> "Decree affirmed."

This case is of particular interest in relation to this proceeding for *it required an act of Congress,* in writing Section 77B of the Bankruptcy Act, to give the Interstate Commerce Commission the jurisdiction it previously sought to establish by the imposition of conditions.[26]

---

[26] As Congressman LaGuardia stated in the debates in the House on the amendments to the Bankruptcy Act (76 Congressional Record, 72nd Cong., 2nd Sess., p. 5358):

> "We have taken the views in the minority opinion in the *Chi-*

The 1948 order authorizing issuance of a license was clearly separate and distinct from the invalid conditions subsequently imposed and included all findings prerequisite to authorization of a license for the project as a whole. The invalid conditions, which were imposed in 1949 when the transmission lines were included within the project, related to matters held to be outside any of the terms of the Act and of *legislative* rather than *administrative* concern. No further administrative action was either necessary or proper. It was, accordingly, appropriate for the Court of Appeals to delete the invalid conditions as surplusage separate and distinct from the order authorizing the issuance of the license, and to affirm the order without the conditions, as complete in and of itself, fully exercising the Commission's duties under the Act.

III.

No Power Has Been Conferred Under Any Act of Congress to Impose the Conditions Complained of Upon Any License Issued Under the Federal Power Act.

Petitioner's initial argument on the merits is based upon a completely false premise, which assumes that Congress has delegated to Petitioner the authority of the United States to impose conditions or restrictions upon the use of its property. We have never contended, and specifically so stated in our briefs below, that the United States, in its sovereign capacity as the owner of the public lands, cannot condition their use as it sees fit. Consequently, the cases

---

cago, Milwaukee & St. Paul Railroad case, even to the extent that all incidental and indirect costs, expenses and fees are subject to the control of the Interstate Commerce Commission, and have written that into the law."

cited at page 32 of Petitioner's brief have no relevance whatsoever.[27]

In the entire discussion of the substantive issue here, Petitioner cites only two other cases. One, in a footnote at page 45 of its brief, is cited in support of the less than startling proposition that sometimes "licensees" under

---

[27] *Hamilton* v. *Regents of University of California*, 293 U. S. 245 (1934), involving the alleged repugnancy of required courses in military science by a state university to *both* the State and Federal Constitutions, and *Sinclair* v. *United States*, 279 U. S. 263 (1929) involving the authority of a Congressional committee to investigate matters affecting reserve oil lands of the Navy, are too patently irrelevant to require discussion.

Of considerable interest, however, is the case of *United States* v. *The City and County of San Francisco*, 310 U. S. 16 (1940) (Pet. Br. p. 32). This case involved the Hetch-Hetchy Act of December 19, 1913 (38 Stat. 242), which is the subject of the first proviso to Section 29 of the Federal Power Act, stating:

> "*Provided*, That nothing herein contained shall be held or construed to modify or repeal any of the provisions of the Act of Congress approved December 19, 1913, granting certain rights of way to the City and County of San Francisco, in the State of California."

This indicates that the provisions of the Federal Power Act might otherwise be deemed to modify or repeal the provisions of the earlier statute, requiring, *inter alia*, that "Hetch-Hetchy power be publicly distributed" (310 U. S. at p. 30), and thus emphasizes the distinction between the limited power of the Commission to impose conditions and the very broad power exercised *by Congress* in so conditioning the Hetch-Hetchy grant.

Further, the reasoning applied by this Court in the *San Francisco* case is equally applicable here. There the City contended that its arrangement with the private utility was a contract of agency rather than a sale, and pointed to precise characterizing language in the instruments executed by it and the utility. Nevertheless, this Court said (310 U. S. 16, 28):

> "Mere words and ingenuity of * * * expression * * *, cannot by description make permissible a course of conduct forbidden by law."

Part I of the Federal Power Act are not also "public utilities" under Part II of the Act—Respondent is both a "licensee" and a "public utility". The other case, *Idaho Power Company* v. *Chapman* (D. D. C., Civil Action No. 4540-50, June 2, 1952),[28] is mentioned at pages 54-55 as upholding the validity of the conditions imposed by the Secretary of the Interior's regulations under the Act of March 4, 1911, (which are set out, *in extenso*, in the Appendix to Petitioner's brief). The statutory power of the Secretary of the Interior under that Act, of course, has nothing to do with this case.

The major part of the balance of Petitioner's argument on the merits (Pet. Br. 50-55), consists solely of an analysis of the irrelevancies of the Administration's public power program, numerous, self-serving declarations from the reports of the Department of the Interior and affiliated bodies, and recitals of a series of totally unrelated acts of Congress, which recitals have no more relevance to the issue here than a list of "begats" in the Book of Chronicles.

On the other hand, we submit that there is proof conclusive that Congress never made any such delegation of the sovereign's rights over its own property to anyone, but, in fact, spelled out most clearly its intention to withhold such power in enacting both the present statute and the original Federal Water Power Act of 1920.

---

[28] The Solicitor General also casually ignores three other rather important considerations relating to this action: (1) the regulations set forth in the Appendix to his brief here are not the same as those considered in the Chapman case, but were drastically amended on July 1, 1952, subsequent to that decision, (2) such decision was grounded primarily on the determination that the Declaratory Judgment action therein was premature in light of the determination of this Court in *Eccles* v. *Peoples Bank*, 333 U. S. 426 (1948), and (3) a motion for a new trial is pending in the District Court with respect to this decision on the grounds of such subsequent changes in the Department of the Interior's regulations and the decision of this Court in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 937, 7 S. Ct. 863 (1952).

A. No such authority was conferred, either expressly or by implication, by the Federal Water Power Act of 1920.

The licensing authority conferred upon the Commission under the provisions of the 1920 statute (Act of June 10, 1920, 41 Stat. 1063, formerly 16 USC § 791), is identical, with one important exception which we shall discuss later,[29] with that contained in the present statute.[30] Nowhere in the former Act is any authority granted to *anyone* (including the Commission or the Secretaries of War, Interior or Agriculture, who were the original members of the Commission) to require that the use of the public lands be conditioned upon the transportation of government power, or that electric utilities seeking licenses thereunder should be subject to the obligations of common carriers. This is true even though the Mineral Leasing Act of 1920, adopted some five months prior to the Federal Water Power Act, required that oil and natural gas pipe lines could use right of ways through the public lands only upon the express condition that they "shall be constructed, operated and maintained as *common carriers*", 41 Stat. 449, c. 85, § 28, 30 U. S. C. § 185.[31]

By reason of the fact that the Mineral Leasing Act was adopted on February 25, 1920, it is most logical to assume that the question of imposing common carrier obligations upon electric utilities under the Federal Water Power Act was in the mind of Congress during the debates upon that statute. Research shows not only that the precise question was considered, but that the following amendment was ac-

---

[29] See page 42 *infra*.

[30] The licensing provisions with which we are concerned here of the present statute, Sections 4(e), 10(e), 10(e) and 10(e) have the same subsection numbers in both statutes with the exception of 4(e) which was formerly Section 4(d) of the Federal Water Power Act.

[31] See page 45 with respect to the 1935 Amendments to the Mineral Leasing Act.

tually proposed by Representative Mays to H. R. 3184, the bill which became the Federal Water Power Act of 1920 (58 Cong. Rec., 66th Cong., 1st Sess. (1919) p. 2136):

> "That *all transmission lines* constructed or operated under authority of this act shall be constructed, operated, and maintained as *common carriers.*"

There followed the colloquy quoted below between Representative Mays and Representative Esch, the House manager of the bill (*ibid.* p. 2137):

> "Mr. Mays: Why do you make railroads common carriers and why do you make pipe lines common carriers? Mr. Esch: We have made both of those common carriers because they entered into interstate commerce. But *the theory of this bill is to allow the State* regulatory body to have *control over* the rates, the securities, and other features of *the transmission lines* and power developments within the State, and it is only where the current is interstate *and where the State commissions can not agree, or where there is no commission*, that we give *this* commission the powers that are granted to the Interstate Commerce Commission."

The Mays amendment was overwhelmingly defeated (*ibid*).

It is patent, of course, that before any utility can be required to carry the goods or products of another, or of the public generally, it must be denominated a "common carrier". This is precisely the theory on which Congress proceeded in enacting the 1935 amendments to the old act, bringing into being the current statute. The original provisions of the Wheeler-Rayburn Bills, requiring public utilities to exchange energy and transmit energy for other persons upon request, were termed the "common carrier" provisions of the proposed legislation (*Hearings before House Committee on Interstate and Foreign Commerce on H. R. 5423*, 74th Cong., 1st Sess., (1935) p. 531 and SEN. REP. No. 621, 74th Cong., 1st Sess. (May 13, 1935), p. 19).

These provisions were entirely eliminated upon enactment of the statute as we shall see later on.[32]

It would, therefore, be difficult to find a more clear intention on the part of Congress to withhold the power to require the transmission of energy for others, including the Federal Government, and to reserve that power to the states. Here Idaho Power Company is subject to comprehensive regulation by public service commissions in the three states in which it operates, *Oregon Compiled Laws* (Ann.) Title 112; *Idaho Code* Title 61; and *Nevada Compiled Laws* 1929 (and Supps.) Section 6100 *et seq.* And there is, of course, no showing of disagreement among such commissions with respect to these lines or any other part of the system of Idaho Power Company. Further, as this Court has pointed out in *First Iowa Hydro-Elec. Coop.* v. *Federal Power Commission*, 328 U. S. 152, 171 (1946):

> "We find that when [the Federal Power] Act is read in the light of its long and colorful legislative history, it discloses both a vigorous determination of Congress to make progress with the development of the long idle water power resources of the nation, and a *determination to avoid unconstitutional invasion of the jurisdiction of the states. The solution reached is to apply the principle of the division of constitutional powers between the state and federal governments.* This has resulted in a dual system involving the close integration of these powers rather than a dual system of futile duplication of two authorities over the same subject matter."

Consequently Petitioner's argument that the power here claimed was delegated under the 1920 Act must fail, entirely aside from the clear revelation of Congressional intent provided by the defeat of the Mays amendment, for the reason stated by this Court in *Connecticut Light and Power Co.* v. *Federal Power Commission*, 324 U. S. 515, 532 (1945):

> "'Where a federal agency is authorized to invoke an overriding federal power except in certain prescribed

[32] See page 46 *infra*.

situations and then to leave the problem to traditional state control, *the existence of federal authority to act should appear affirmatively and not rest on inference alone.*' Yonkers v. United States, 320 U. S. 685, 692, 64 S. Ct. 327, 331, 88 L. Ed. 400; State of Florida v. United States, 282 U. S. 194, 211, 212, 51 S. Ct. 119, 1923, 124, 75 L. Ed. 291; cf. Palmer v. Commonwealth of Massachusetts, 308 U. S. 79, 84, 60 S. Ct. 34, 36, 84 L. Ed. 93; Federal Trade Commission v. Bunte Bros., 312 U. S. 349, 351, 61 S. Ct. 580, 581, 85 L. Ed. 881."

B. The authority here claimed was specifically withheld by Congress in enacting the Federal Power Act of 1935.

Petitioner, in substance, contends (Pet. Br. pp. 38, 44-46) that the Federal Power Act is an entirely new statute superimposed upon the old Federal Water Power Act and therefore it in no way affects the previous licensing powers of the Commission. That is not so. The purpose of the Congressional action of 1935 was to codify and greatly expand existing legislation relating to the public utility industry. Section 212 of the Public Utility Act of 1935, 49 Stat. 847 (in which was also included the Public Utility Holding Company Act of 1935), specifically provides "Section 1 to 29, inclusive, of the Federal Water Power Act, *as amended*, shall constitute Part I". Section 213 provides that "the Federal Water Power Act, as amended, is *further amended*, by adding thereto" Parts II and III.[33]

Thus it is clear that the present statute is a legislative unit as a whole and may not be divided into mandates to be separately applied as the Petitioner's particular desires at the moment dictate.

---

[33] Senate Report (SEN. REP. No. 621, 74th Cong., 1st Sess., *supra*) points out at p. 18:

> "The Federal Water Power Act, as amended, *including the new parts 2 and 3*, is given the short title, the 'Federal Power Act.' This *entire* act is to be administered by the Federal Power Commission."

Turning from this general intent of Congress to weld the two acts into a unified whole, we find that the specific sections of Part I in issue here were amended by the Public Utility Act of 1935 so as completely to demolish Petitioner's contentions. Under the 1920 statute, Section 10 (which Petitioner's brief not only admits but contends is an all important section relating to this litigation), provided that "all licenses issued under this *Act* shall be under the following conditions". In the 1935 amendments the word "*Act*" was replaced by the word "*Part*". However, subdivision (g) of Section 10 reading "Such other conditions not inconsistent with the provisions of this *Act* as the Commission may require" *remains unchanged*. Similarly, the word "Part" was substituted for "Act" in the first sentence of Section 6. But the second sentence, which provides licenses shall contain "such further conditions, if any, as the Commission may prescribe in conformity with this *Act*", was not altered by the 1935 amendments. (See H. Rep. No. 1318, 74th Cong., 1st Sess. (1935), pp. 38-39).

It therefore follows inexorably, no matter what the Commission's authority to impose conditions might have been theretofore, that from and after August 26, 1935, the Commission could only impose conditions which were consistent with the present Act *as a whole*, including Parts II and III, regardless of whether the source of Congressional authority, in enacting the statutes, be the exercise of sovereign power over commerce or that of proprietorship over public lands (see Petitioner's Brief, p. 36).

Viewed in this context the virtually incredible attempts of Petitioner to distort the testimony of Mr. Dozier DeVane, at pages 40-44 of its brief, lie fully exposed. And the irretrievably damaging quality of this testimony is demonstrated, particularly where Mr. DeVane says (*Hearings before House Committee on Interstate Commerce, on H. R. 5423*, 74th Cong., 1st Sess., 1935):

> "If * * * it is the desire of Congress not to * * * give the municipal or governmental projects the right to

use the *transmission lines of private industry*—and we have not succeeded in making that clear in this bill—an amendment should be proposed that will do it better. It will receive our hearty endorsement." (p. 514).

* * * * * * * * *

It is *not* intended to give the Commission power to require the *private lines to take on any power generated* by municipal plants or *by any Government plant*. (p. 546).[34]

---

[34] It should also be noted that Petitioner's contention (p. 44) that Mr. DeVane's discussion related only to this "bill", raising the implication that he was only talking about Parts II and III, ignores the further statement of Mr. DeVane at page 549 of his testimony where he refers to this "*law*":

"The only thing that we have discussed is the desirability of making it perfectly clear in *this law* that it is not the intention of *this law* to reach out and get control of that power nor is it the intention of *this law* to authorize this Commission to require the transmission of that power on the lines of these *private operating companies*" [and not specifically "public utilities" as defined by Section 201(e) in Part II of the Act.]

This is also made clear by Mr. DeVane's testimony before the Senate Committee which Petitioner does not mention in its brief, *Hearings before Senate Committee on Interstate Commerce on S. 1725*, 74th Cong., 1st Sess. (April 19, 1935):

"Mr. DeVane. The industry will probably appear before you and say that the Federal Power Commission is given power under this bill to make the private utilities take government power from these projects—that we have the authority to require physical connection and to make them purchase power. I just want to make it clear before they start on that that the *bill* itself does not give the Commission that authority, and our intention in the preparation of the *bill* was not to give the Commission that authority. If there is any doubt about it, a clarifying amendment should be put in if it is the view of the Congress that the authority should not be given. But it is not the intention of this *bill* to do that." (pp. 256-7)

* * * *

"Senator Hastings. May I inquire what is there about this Title II [which constituted that part of the Public Utility Act

In sum, the construction attempted by the Solicitor General is to accuse Mr. DeVane, and the then members of the Commission he was authorized to represent (*ibid.* 515), of perpetrating a fraud upon the Congress.

Entirely aside, however, from the interpretative aid provided by Mr. DeVane's testimony, is the far more important fact that the Senate Committee inserted an entirely new subsection[35] in the bill relating to this specific problem. The Senate Report (No. 621, 74th Cong., 1st Sess.) relating to this amendment states at p. 19:

> "Despite repeated assurances by representatives of the Federal Power Commission that no such authority was intended, the charge was frequently made that the bill as originally introduced authorized the Commission to *compel private utilities to establish connection or exchange power with public plants.* This new subsection carries out in unmistakable terms the original intention of the bill in this respect."

And again at page 49:

> "Subsection (e)[35] expressly excludes from the op-

---

of 1935 which became Parts I, II and III of the Federal Water Power Act as amended] that the industry does object to?

"Mr. DEVANE. I can tell you what they tell us they object to. I think *title II*, from their standpoint, is important, and they may look upon it as serious regulation. They object very much to Section 202(a), which makes their lines common carriers. They object very seriously to any authority that would make them purchase or transport power from a public project, which is not in this *bill* but to which they devoted a great deal of their time at the House Hearings. Those, as I recall, are the two chief attacks that they made on *title II*.

"The CHAIRMAN. Let me understand you. You say that there is nothing in *the bill* which compels them to transport power of a public project over their lines. Am I correct in that?

"Mr. DEVANE. That is right, sir." (p. 260).

[35] Which became Section 201(f) upon final enactment.

eration of the act the United States, the States, municipalities, and all of their agencies. It is designed to make perfectly clear that *no compulsory powers may be exerted upon public projects or upon privately owned projects for the benefit of public plants.*"

On the other hand, at exactly the same time Congress specifically gave to the Secretary of the Interior, in amending the Mineral Leasing Act of 1920 (41 Stat. 449, 30 USC § 185), substantially the same power over natural gas and oil pipe line companies crossing the public lands that it denied to the Federal Power Commission with respect to electric utilities. The amendment to that Act, *approved five days prior* to the signature of the Public Utility Act of August 26, 1935, added the specific requirement that such pipe line companies crossing the public lands:

> "* * * shall accept, convey, transport * * * oil or natural gas *produced from government lands* in the vicinity of the pipe line in such proportionate amounts as the Secretary of the Interior may * * * determine to be reasonable," (Act of August 21, 1935, c. 599, § 1, 49 Stat. 687).

It is readily apparent, therefore, that the concept of using private facilities for the furtherance of governmental purposes was before the Congress when the Federal Power Act was enacted. And yet, this power was considered and withheld from the Commission.

If Congress had decided to give such power to the Petitioner, it obviously would have done so in a manner similar to the grant of authority conferred by the amendment to the Mineral Leasing Act, *supra*. As this Court pointed out in *Interstate Commerce Commission* v. *Oregon-Washington R. & Nav. Co.*, 288 U. S. 14, 35 (1933):

> "If Congress had intended to give an executive tribunal unfettered capacity for requisitioning investment of capital * * * we may well be confident that Congress would have made its meaning far clearer and more direct *than in the present meager provisions* * * *.

Moreover, *if the purpose were that claimed* by the Commission, *support should be found in the legislative history.*"

Finally, as we have mentioned above, the whole common carrier concept, which is the essential predicate to requiring any utility company to act as a carrier for *anyone,* was an important aspect of the original drafts of the Wheeler-Rayburn bill, but was completely eliminated upon the enactment of the statute in its final form. The Senate Committee Report states (SEN. REP. No. 621, 74th Cong., 1st Sess.) at p. 19:

> "*C. Interconnection and coordination of facilities; the common carrier.*—Section 202(a) of S. 1725 imposed upon each public utility the duty to furnish energy to, exchange energy with and transmit energy for any person upon reasonable request. This provision has been eliminated, and the other subsections of the old section 202 which relate to rates have been removed to the general rate section (sec. 205). While imposition of these duties may ultimately be found to be desirable, the committee does not think that they should be included in this first exercise of Federal power over electric companies. It relies upon the provision for the voluntary coordination of electric facilities in regional districts contained in the new section 202(a) (formerly sec. 203(a)), for the first Federal effort in this direction."

Congress having already spoken on this all important subject in a detailed and carefully drafted section of the Act, it is clear that *all the authority conferred upon the Commission with respect to interconnection of facilities and transmission of power is contained in that section.* Resort can not be had to any other section of the statute to expand such authority. *The Act is the limit, as well as the grant, of the power conferred.* As this Court stated in *MacEvoy Co.* v. *United States,* 322 U. S. 102, 107 (1944):

> "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter spe-

cifically dealt with in another part of the same enactment.' "[36]

C. No other federal statute confers authority upon either the Commission or the Department of Interior to impose conditions upon licenses inconsistent with the Federal Power Act.

The compilation of statutes related to the Federal Power Act and the jurisdiction of the Commission contained in the pamphlet copy of the Act filed with the Clerk (Pet. Br. p. 3) illustrates the type of authority conferred upon the Federal Power Commission by these independent enactments. The pattern of these Acts is the same in that they modify the Commission's power to issue licenses with respect to projects in specific areas of land located within Indian reservations, national parks and monuments, in lands subject to interstate compacts, and utilize the Commission as a ready accounting and supervisory agency over the projects operated by new government agencies created by the Congress, such as the TVA and the Bonneville Power Administration.

But in none of those enactments or in those passed subsequent to the date of the pamphlet, such as the important and far-reaching Flood Control Act of 1944 (Act of December 22, 1944, 28 Stat. 887) is the scope of the Commission's licensing authority in any way extended to permit the imposition of conditions inconsistent with the provisions of the Federal Power Act. This is equally true of the limited power of the Secretary of Interior to recommend the imposition of license conditions to the Federal Power Commission. Reference is made in Petitioner's brief (p. 57) as to the authority conferred upon the Secre-

---

[36] See also *Kepner* v. *United States*, 195 U. S. 100, 125 (1904) and *Townsend* v. *Little*, 109 U. S. 504, 512 (1883). Similarly, as this Court has pointed out "Specific terms prevail over the general in the same * * * statute", *Ginsburg & Sons* v. *Popkin*, 285 U. S. 204, 208 (1932); *Missouri* v. *Ross*, 299 U. S. 72, 76 (1936).

tary of the Interior by the Act of March 4, 1911, 56 Stat. 1253, 43 U. S. C. §§ 957, 959 and 961. A reading of that statute and the Department of the Interior's regulations promulgated thereunder (both set forth in the Appendix to Petitioner's Brief) make plain their total irrelevance to the issues in this case and Petitioner's improper and premature attempt to pre-try in this forum the case of *Idaho Power Company* v. *Chapman* (D. D. C., Civil Action No. 4540-50, June 2, 1952), *supra*, p. 37.

The only authority given to the Secretary of the Interior with respect to the issuance of licenses under the Federal Power Act is found in Section 4(e), which provides that licenses under the act shall:

> "contain such conditions as the Secretary of the department under whose supervision such *reservation* falls shall deem necessary for the adequate protection and utilization of such *reservation*".

As we have pointed out above, the two transmission lines here in question cross both the public lands *and* reservations of the United States. With respect to the Boise line, of its total length of 73 miles, 31.6 miles cross public lands, but only 0.2 miles are upon *reservations* of the United States. In the case of the American Falls line, having a total length of 116 miles, 93.7 miles cross public lands, but only 27.2 miles thereof are upon *reservations* of the United States. But these reservations are not statutory reservations such as national forests, parks or monuments. They are merely reclamation withdrawals (under the Reclamation Act of June 17, 1932, 32 Stat. 388), the use of which would be wholly unaffected by the mere erection of transmission lines. No part of the Bliss project lies within a statutory reservation of the United States, under the "supervision" of the Secretary.

It is therefore obvious that the Secretary has no statutory authority whatsoever even to propose the conditions complained of, as they have no relation whatever to the

"protection and utilization of such reservations" (R. 22).

What the Secretary has attempted, of course, is to seize, through the guise of conditions, the administrative control over the Commission exercised by his predecessors in office under the Federal Water Power Act prior to the 1930 amendment. This amendment, (Act of June 23, 1930, 46 Stat. 797), referred to at page 33 of Petitioner's brief, substituted an *independent* commission of five commissioners, each appointed by the President, in lieu of the original body composed of the Secretaries of War, Interior and Agriculture. (See historical note to 16 U. S. C. A. § 792).

Oddly enough the impetus for this amendment came from the three secretaries themselves. In stating some of the reasons for the desired change, the then Secretary of Interior, Ray Lyman Wilbur, made the following significant comment in hearings before the House Committee on Interstate and Foreign Commerce (*Hearings on H. R. 11408*, 71st Cong., Second Sess. (1930), pp. 48-49):

> "I agree with Secretary Hyde [Secretary of Agriculture] that we can well allow these departments to be represented at hearinigs before the Commission to present phases of departmental interest, rather than to have the control remain in the departments. Otherwise even though you set up the Commission, you will leave in the hands of the Secretaries, or in the hands of the bureau heads, the power to negate whatever the Commission may want to do, that is, to ask the consent of the department involved.
>
> I cannot conceive of this Federal Power Commission really being effective *unless it controls all power sites where it grants licenses*, for if you have to ask the permission of this department or that department, there will be difficulties that will be absolutely impossible to overcome."

Consequently, the efforts here of the Secretary of the Interior to extend the effective area of the regulations of his Department, *by influencing the actions of an independent agency*, are just as improper (and as complete a deroga-

tion of the intent of Congress in enacting the 1930 amendment) as if the present Secretary should seek to regain the control over the railroad industry held by his predecessor under the original "Act to Regulate Commerce" (Act of February 4, 1887, 24 Stat. 379), prior to the creation of the Interstate Commerce Commission as an independent agency under the Act of March 2, 1889 (25 Stat. 855, 49 USC § 11).

D. The fact that petitioner has not exercised so important a power for nearly 30 years is further proof that such authority was not conferred by Congress.

It is also of marked significance that during the entire period from the enactment of the original Federal Water Power Act in 1920 to October 4, 1949, when the Secretary of the Interior first proposed the conditions complained of to the Commission (R. 95) that it never occurred to either the Secretary of War, Interior or Agriculture, or to the Commission itself, that so important a power had been granted by the Congress. Petitioner in its original Brief on Certiorari attempted to anticipate this question by references to matters *dehors* the record which, interestingly enough, are repeated here only in the most oblique fashion (Pet. Br. 50). It was there contended (Petitioner's Brief on certiorari, p. 18) that "The construction of power plants by the United States was more or less limited until the past decade," and that "The recent development of the public power program explains the absence of conditions for wheeling in earlier licenses granted by the Commission."

As was shown in our Reply Brief on Certiorari the facts are to the contrary. The Annual Report of the Secretary of the Interior (1950), cited at page 20 of Petitioner's Brief on Certiorari, shows (pp. 49-51) that of the 3,312,267 kilowatts of installed generating capacity of the public power projects there listed 2,818,167 kilowatts, or approximately 85%, was installed in 1942 or earlier. As the tabulation indicates, the great surge in the kilowatt installation of public power projects came in the years 1935-1942. Hence

such projects were *authorized* at the time when Congress deliberately considered, and withheld from the Commission, the power herein claimed. In fact, as Petitioner's Brief on Certiorari inadvertently points out (pp. 18-19), two of the largest public power plants, Bonneville and Grand Coulee, were authorized in 1935, the exact year in which Congress added Section 201(f) to the Federal Power Act and categorically stated its intention with respect to the issue here. (See page 44, *supra*). The third major unit, Hoover or Boulder Dam, was authorized by the Act of December 21, 1928, c. 42, 45 Stat. 1057, 43 USC 617.

Petitioner throughout its brief, by the use of self-serving statements[37] from its own correspondence and published reports, points to the advantages of "wheeling *arrangements*," and the coordination of private and government facilities (Pet. Br. 50), and attempts to cast Respondent in the role of the protaganist of black reaction who seeks to deprive the Government and the public of the benefits asserted to be derived. Such arguments, of course, have absolutely no bearing upon the issue here, nor can they enlarge one whit the power and authority of either the Secretary of Interior, or the Commission, to impose conditions upon licenses issued under the Federal Power Act. *Morrill* v. *Jones*, 106 U. S., 466, 467 (1882).

---

[37] Cf. Concurring Opinion of Mr. Justice Jackson in *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U. S. 937, 72 S. Ct. 863, (1952) at 876:

> "While it is not surprising that counsel should grasp support from such unadjudicated claims of power, a *judge cannot accept self-serving pretrial statements* of the attorney for one of the interested parties as authority in answering a constitutional question, even if the advocate was himself."

See also *A. [illegible] Co.* v. *Peirson*, 275 U. S. 120, 128 (1927), "A man cannot make evidence for himself by writing a letter containing the statements he wishes to prove," and *United States* ex rel *Esshaki* v. *Yackey*, 19 F. 2d 64, 65 (6 Cir. 1927) and *United States* v. *Block*, 160 F. 2d 604, 607 (9th Cir. 1947) to same effect.

We do point out, however, that Respondent has for more than 30 years engaged with the Bureau of Reclamation in "wheeling" power generated at dams of the Federal Government over its transmission lines, *on a contractual basis.* But when, through the device of conditions to a license or permit, the Federal Government places a pistol at the Company's head and, in effect, says "This is your contract, sign it," the victim cannot very well be accused of a failure to cooperate.

Patently then, the answer as to why "wheeling" provisions have never been suggested before as conditions to Federal Power Commission licenses during the 30 years of that agency's existence is not that public power, in 1949, was a new and novel concept, but more obviously a perverse application of a much older concept that "a man's reach should exceed his grasp." Thus we must apply the rule laid down by this Court in *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 347, 352 (1941):

> "But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred."

And again in *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 513 (1949) where this Court said:

> "Thus for over *ten years* the Commission has never claimed the right to regulate dealings in gas acreage. Failure to use such an important power for *so long a time* indicates to us that the Commission did not believe the power existed."

and held that the Natural Gas Act did not confer such authority upon the Federal Power Commission.

IV.

The Action of Petitioner Constitutes Attempted Legislation and Cannot be Sustained.

As we have demonstrated above, no authority for the conditions proposed by the Petitioners can be found in the text of the statute, its legislative history, or by implication from any general powers granted. On the contrary, the legislative history of the original Water Power Act, as well as subsequent enactment by Congress, clearly shows that no such power was intended to be conferred. It is therefore clear that there is no authority express or implied for such conditions and that, in fact, they contravene rather than carry out the purpose of the statute. They are consequently, void and of no effect because they are in violation of and prohibited by Section 1 of Article I of the Constitution. As this Court pointed out, with reference to unauthorized rule-making, in *Manhattan General Equipment Company* v. *Commissioner of Internal Revenue*, 297 U.S. 129, 134 (1936):

> "The power of an administrative officer or board to administer a federal statute to prescribe rules and regulations to that end is not the power to make law, for no such power can be delegated by Congress, but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. *A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity.*"

Efforts by the Department of the Interior, for example, to legislate for itself are not something new and this Court on a number of occasions has stricken down such attempts at legislation. In *United States* v. *George*, 228 U.S. 14, 21 (1913):

> "If the Secretary of the Interior may add by regulation one condition, may he not add another? If he may require a witness or witnesses in addition to what [the statute] requires, *why not other conditions, and the disposition of the public lands thus be taken from*

the legislative branch of the government and given to the discretion of the Land Department?"

Again in *United States* v. *United Verde Copper Co.*, 196 U.S. 207, 215 (1905), the court said:

> "If Rule 7 [the regulation involved] is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. *Such power is not regulation; it is legislation.* The power of legislation was certainly not intended to be conferred upon the Secretary."

And see also the cases of *Work* v. *Louisiana*, 269 U.S. 250 (1925); *Santa Fe-Pacific Rk. Co.* v. *Lane*, 244 U.S. 492 (1917); and *Miller* v. *United States*, 294 U.S. 435, 439 (1935).

V.

The Conditions and Requirements Imposed by Paragraph (F) of the Commission's Order are Abitrary and Unreasonable and Deprive Respondent of Its Property Rights Without Due Process of Law.

Initially, let us examine the effect such conditions and requirements would have on Respondent and the operation of its utility business.

(F) (1) would require Respondent, at the request of the Secretary of the Interior, to convert the two lines in question from 138,000 volts to 230,000 volts for the exclusive benefit of the government's power systems, and without regard to its effect on Respondent's own requirements and public utility operations, and in violation of Section 202(b) of the Act which provides:

> "That the Commission shall have *no authority* to compel the enlargement of generating facilities * * * ."

(F) (2) would require Respondent to permit the United States to connect any of its transmission facilities with said high-voltage lines at any point, and at as many points, as it desired, regardless of the effect thereof upon the functioning of the Company's own system, and its utilization of its own lines for its own needs and purposes, thereby endangering the operating reliability of said lines and the function and purpose for which Respondent constructed them, at a cost of approximately $3,400,000. (R. 63)

(F) (3) would give the United States the right to transmit energy over Respondent's lines to preference customers of the United States—thus forcing the Company to become a carrier for government power *to be sold in competition with the Company and using the Company's own facilities for such purpose*—"in such amounts as will not *unreasonably interfere* with the licensee's use of said lines." In addition to being forced to assume common carrier status, Petitioner must further submit to interference with its own needs, and use of its own facilities, in performing its obligations as a public utility. "Unreasonably interfere" is an obviously loose phrase susceptible of conflicting interpretations, provocative of dispute and the likelihood of litigation. Can such requirements be said to be within the scope of the Act, passed to encourage investment by utilities[38] and to protect such investment under the standards which the Act itself provides?

(F) (6) would require Respondent to transmit power for the government, even prior to and in the absence of agreement on the terms therefor, upon cost ar-

[38] See H. REP. No. 715, 65th Cong., 2nd Sess. (1918) p. 29, and *Hearings before House Committee on Public Lands on H. R. 1893*, 63d Cong., 2d Sess. (1914) p. 496.

rangements which are indefinite and uncertain, and which Respondent submits will leave this Court also in considerable interpretative doubt.

(F) (8) would prevent Respondent from withdrawing capacity as needed by its customers, except upon an excessive and unreasonable notice period of two years, thus rendering Respondent's investment useless for the service of its own customers during such period. What are Respondent's customers to do in the meantime? Is Respondent to be required to construct additional lines, otherwise unnecessary, in order to perform its duties as a public utility imposed upon it by law, including the very Act which is administered by the Commission?

(F) (9) would work a clear violation of Section 6 of the Act, providing for licenses having a fixed term, and specifically setting forth the sole conditions for the revocation, alteration and cancellation thereof. Section 6 specifically provides that "Licenses may be revoked *only for the reasons and in the manner prescribed under the provisions of this Act*, and may be altered or surrendered *only upon mutual agreement between the licensee and the Commission.*" Paragraph (F) (9), however, offers only a licênse which is not a license, being subject to alteration or partial revocation upon the happening of some future event, or unknown conditions subsequent, and requiring Respondent to agree in advance to partial surrender of its license rights. This is not only a violation of Respondent's rights under Section 6 of the Act (see *United States* v. *Colorado Power Co.*, 240 F. 217 (D. Colo. 1916) and *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599, 610 (1930), on an *ex post facto* basis, but an attempted abdication by the Commission of its licensing powers and its jurisdiction over licensed project property under the Act. Once

property becomes subject to license as a part of a "project," the intent of the Act is clear that it shall remain so, and not later be removed from under the license and the jurisdiction of the Commission, to be turned over to the jurisdiction of some other agency, and the license rights of Petitioner thus abrogated.

As we have pointed out above *all of the conditions contained in Paragraph (F) were conceived and proposed by the Secretary of the Interior and not by the Commission.* The authority to include such conditions in transmission line licenses under the Act derives solely from Section 4(e), which contains its own limitation that such conditions must be "necessary for the adequate protection and utilization" of the reservations of the United States involved.

Careful analysis of the Act reveals no other provisions which could be construed in any way as authorizing the inclusion of such conditions with respect to a license of the type here in question. Nor can this be attributed to any oversight on the part of Congress because the statute is replete with references as to the specific authority of the Commission and the various Executive Departments in particular situations.

For example, Section 10(e) provides that when licenses are issued involving the *use* of dams or other structures *owned by the United States* in reclamation projects, they shall be "subject to the approval of the Secretary of the Interior." Section 18 provides that the Commission shall require the construction by a licensee at its own expense of "such lights and signals as may be directed by the Secretary of War and such fishways as may be prescribed by the Secretary of Commerce." Section 24 provides that the Secretary of the Interior shall declare lands reserved for power sites open to location and entry following appropriate action by the Federal Power Commission.

Section 15(e), above, is of particular interest as the approval of the Secretary of the Interior is limited specifically to situations "involving the *use* of government dams or other structures *owned* by the United States." No *such structures are involved or to be used in connection with any part of the Bliss Project, or any of its facilities, under license here.*

Even a casual reading of the conditions set out in Paragraph (F) shows very clearly they have nothing to do with the "protection" or "utilization" of the reservations (i.e., reclamation withdrawals) here involved. On the other hand, it is patent that the real purpose for which such conditions were designed and requested by the Secretary is the implementation of the public power policies of the Department of the Interior. Such conditions relate solely to the conversion of the Petitioner's 138 kv transmission lines to a voltage of 230 kv; "upon the request of the Secretary of the Interior"; the coerced assent of the Respondent to the interconnection of such lines with transmission facilities of the United States; the conveyance of public power over such lines, to the exclusion of the owner's use of the full capacity thereof, and in direct competition with the sale by Respondent of energy generated in its own plants.

If any doubt could possibly exist as to the purpose of such conditions, it is completely dispelled by the words of the Secretary of the Interior in his report to the Commission of August 10, 1949 (R. 69) that:

> "The Department has, for some time, been vitally interested in and concerned with the supply of power in the southern part of the State of Idaho. The Federal Government has hydroelectric projects in the area, and other Federal projects are either under construction or have been authorized to be constructed. Prior to the time when the Idaho Power Company applied for a pre-construction permit to erect the transmission line over the public lands, the Bureau of Reclamation and the Bonneville Power Administration made and submitted a joint report * * *. *In this report the two*

agencies of the Department proposed that the United States construct, own, and operate a transmission line which would connect the eastern and western parts of the southern Idaho region. . . ."

In contrast to the conditions in Paragraph (F), as proposed by the Secretary, the Commission's Order, particularly Paragraphs (B) (4), (5), (9) and (10) (R. 104-106), contains a number of customary and appropriate "conservation" conditions. No argument is raised with respect to these latter conditions as they are reasonably related to the use of the federal lands involved and are in conformity with the purposes of the Act.

In numerous cases this Court has set aside unreasonable agency requirements which have not kept within the bounds of legislative delegation, or which were arbitrary and not reasonably directed to the accomplishment of the purposes of the statute under which they were made. As Mr. Justice Brandeis stated in *International Railway Co.* v. *Davidson*, 257 U. S. 506, 514 (1922), "A regulation to be valid must be reasonable and must be consistent with law." See also *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue*, 297 U. S. 129, 135 (1936) and *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599, 610 (1930).

The essential practical effect of Paragraph (F) of the Order here under review is to force Respondent to become a common carrier of electricity without its consent. The fact that it acts in that capacity for only one person, the Federal Government, is of no importance because one such relationship takes it out of the category of a person transporting only its own property, and the absence of a contractual basis obviously removes it from the class of contract carriers.

This was substantially the situation in the case of *Frost Trucking Co.* v. *Railroad Commission of California*, 271 U. S. 583 (1926). There the California Supreme Court construed a state statute as requiring private contract motor carriers to obtain a certificate of convenience and

necessity as a common carrier, as a condition precedent to the use of the state highways. It was contended that, as applied to private carriers, "the Act has the effect of transforming them into public carriers by legislative fiat." The same result would be accomplished here by "administrative fiat", without legislative authorization of any sort. The opinion of the Court stated at pp. 592-594:

> "That, consistently with the due process clause of the Fourteenth Amendment, *a private carrier cannot be converted against his will into a common carrier by mere legislative command,* is a rule not open to doubt and is not brought into question here. * * * The naked question which we have to determine, therefore, is whether the state may bring about the same result *by imposing the unconstitutional requirement as a condition* precedent to the enjoyment of a privilege. * * *.
>
> * * *
>
> "If so, constitutional guaranties, so carefully safeguarded against direct assault, are open to destruction by the indirect, but no less effective process of requiring a surrender, which, though in form voluntary, in fact lacks none of the elements of compulsion. * * * *In reality, the carrier is given no choice, except a choice between the rock and the whirlpool,*—an option to forego a privilege which may be vital to his livelihood or submit to a requirement which may constitute an intolerable burden. * * *
>
> "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

Paragraph (F), here complained of, "is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe," *Morrill* v. *Jones*, 106 U. S. 466, 467 (1883), and as in the

case of *United States* v. *Colorado Power Co.*, 240 Fed. 217, 221, *supra*, p. 56, relating to the authority of the Secretary of the Interior under an earlier statute, "*Congress did not* manifest any intent to *give the Secretary* the right and power to acquire for complainant *an interest*, directly or indirectly, *in defendant's plant or business*, * * * "

VI.

The Conditions Complained of Constitute a Seizure of Respondent's Property Without the Authorization of Congress.

The illegal action of the Petitioner complained of here, while differing in form (and much less dramatic and nation-wide in scope), is substantially the same in principle as the action of the Executive recently before this Court in *Youngstown Sheet & Tube Company* v. *Sawyer*, 343 U. S. 937, 72 S. Ct. 863 (1952). Analysis of the conditions sought to be imposed plainly shows they are tantamount to the seizure of Respondent's property when the Department of the Interior thereunder takes over the "unused capacity" of the line or directs that its capacity be increased to achieve the same result. Comparison of these conditions with the emergency authority conferred upon the Executive by the various acts of Congress shown in Appendix I to the Concurring Opinion of Mr. Justice Frankfurter in the *Youngstown* case (72 S. Ct. at p. 900) reveals a remarkable similarity. And as that Opinion points out (*ibid.*, p. 891) "In every case [Congress] has qualified this grant of power with limitations and safeguards" and "that Congress deemed seizure so drastic a power as to require that it be carefully circumscribed * * * "

Here, unlike the limitations and safeguards shown in Appendix I to the Opinion, carefully limiting the power given for a short period or "for a defined emergency," the Secretary's power has no limitation in time, nor is it related to

any "standard" other than his own judgment. In fact, as Item 9 of such appendix shows (p. 904), substantially the same power the Department of the Interior seeks to exercise here was given to the President by Congress in Section 16 of the old Federal Water Power Act of 1920, to be exercised upon an executive determination that "the safety of the United States demands," and the seizure is "for the purpose of manufacturing nitrates, explosives or munitions of war, or for any other purpose involving the safety of the United States".[39] Understandably enough, Petitioner has never mentioned this Section of the Act in any of its briefs, as the conditions precedent recited therein could never be met under the facts of this case. Inasmuch as the Congress has prescribed certain procedures for the executive department to follow in seizing such lines, it must follow these directives and it cannot now choose to adopt other methods. See opinion of Mr. Justice Clark in the *Youngstown* case, 72 S. Ct. at 882.

Much ado has often been made (Petitioner's brief, pp. 3, 9, 10) of the argument that Petitioner's use, or seizure, of the Respondent's transmission lines will be "with full compensation to the Licensee." The provisions of paragraph (F) of the Commission's order do provide for payment to the Respondent (R. 107-108). However, the Department of the Interior clearly "has no power to raise revenues", 72 S. Ct. at p. 887, and no showing has been made that any monies have been, or will be, appropriated to compensate the licensee for such taking and use of its transmission line properties. On the contrary, the Department of the Interior recently has been seriously taken to task by a Congressional Committee on the precise question of its unauthorized expenditures in connection with the public power program (Hearings on the "Interior Department Appropriations for 1952," Before the Subcommittee of the House

[39] The text of this Section is set forth in full in the Appendix hereto.

Committee on Appropriations, 82d Cong., 1st Sess., Part 1, (1951) pp. 498-543).[40]

In view of these circumstances, the "compensation" to Respondent, blandly assured by Petitioner's Brief, might be something less than "full". Entirely aside from this question of the equities to Respondent, Petitioner's emphasis on the payment of "full compensation" may result in his having argued himself out of court because, as the Concurring Opinion of Mr. Justice Douglas in the *Youngstown* case states (72 S. Ct. at p. 887-8):

---

[40] During such hearings the following colloquy took place between Representative Jackson of Washington and Assistant Secretary of the Interior Warne (pp. 513-514):

"Mr. JACKSON. Let us take a look at what you presented to us. I have before me the justifications, the schedule of the program for the fiscal year 1951. I looked all through it and I finally came across an item referred to as the Shasta boundary terminal facilities. Do you think that is descriptive of your intention to interconnect the Bonneville Power Administration and the Central Valley system?

* * * * * * *

Mr. JACKSON. * * * I think that is the basis of your difficulty here. *The conduct of the Bureau of Reclamation subsequent to the denial of funds by this committee* is an important reason why the people of the Pacific Northwest have grave misapprehensions about the Bureau of Reclamation.

In spite of the directive by the Congress not to spend money for designs and plans the Commissioner of Reclamation last fall in California announced it was going ahead with designs and plans to interconnect the two systems. * * *

What authority does Mr. Boke have for making that announcement?

Mr. WARNE. There has not been authority to make the statement that up to this time we are proceeding with the central California-Bonneville intertie, because we do not have the authority to do that.

Mr. JACKSON. *Why does the Bureau persist in defying a directive of the Congress?*"

See also pp. 520-521 of these Hearings.

> "The branch of government that has the power to pay compensation for a seizure is the only one able to authorize a seizure or make lawful one that the President [or the Executive Branch] had effected. * * * If we sanctioned the present exercise of power * * *, we would be expanding Article II of the Constitution and rewriting it to suit political conveniences of the present emergency."

Here no emergency has or could be asserted. The imposition of these conditions has no relation to the present war effort, nor, of course, could the Secretary of Interior, or the Commission, claim to exert any of the prerogatives of the Commander in Chief of the Armed Forces. This is a far weaker case than that of the President in taking executive action, without Congressional authorization, to meet an evident national emergency. All of Petitioner's arguments emphasize that here also, in the language of Mr. Justice Jackson's Concurring Opinion, 72 S. Ct. p. 869, "The tendency is strong to emphasize transient relations upon policies—such as wages or stabilization policy [or the Administration's public power program]—and lose sight of enduring consequences upon the balanced power structure of our Republic."

In consequence no more reasonable determination or one more in concert with the decisions of this Court could be found than the direction of the court below, 189 F. 2d at p. 670:

> "The problem which is presented to us in this case is essentially a legislative problem. * * * If the Commission believes it to be in the public interest to prescribe such a condition upon power project licensees, it should present its views to the Congress."

CONCLUSION

If the Court determines it has jurisdiction to review this case, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

HARRY A. POTH, JR.,
REID & PRIEST,
910 17th St., N. W.,
Washington 6, D. C.

A. C. INMAN,
1220 Idaho Street,
Boise, Idaho.

Counsel for Respondent.

JAMES E. O'BOYLE,
EDWARD L. KANTER,
Of Counsel.

APPENDIX

Federal Power Act

SEC. 16. That when in the opinion of the President of the United States, evidenced by a written order addressed to the holder of any license hereunder, the safety of the United States demands it, the United States shall have the right to enter upon and take possession of any project, or part thereof, constructed, maintained, or operated under said license, for the purpose of manufacturing nitrates, explosives, or munitions of war, or for any other purpose involving the safety of the United States to retain possession, management, and control thereof for such length of time as may appear to the President to be necessary to accomplish said purposes, and then to restore possession and control to the party or parties entitled thereto; and in the event that the United States shall exercise such right it shall pay to the party or parties entitled thereto just and fair compensation for the use of said property as may be fixed by the Commission upon the basis of a reasonable profit in time of peace, and the cost of restoring said property to as good condition as existed at the time of the taking over thereof, less the reasonable value of any improvements that may be made thereto by the United States and which are valuable and serviceable to the licensee.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court
FILED
DEC 5 195
HAROLD B. WILLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 12

FEDERAL POWER COMMISSION, *Petitioner,*

v.

IDAHO POWER COMPANY, *Respondent.*

PETITION FOR REHEARING

HARRY A. POTH, JR.,
REID & PRIEST
910 17th St., N. W.
Washington 6, D. C.
A. C. INMAN
1220 Idaho Street
Boise, Idaho

JAMES E. O'BOYLE
FRANCIS H. CASKIN
REID & PRIEST
910 17th St., N. W.
Washington 6, D. C.
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 12

FEDERAL POWER COMMISSION, *Petitioner*,

v.

IDAHO POWER COMPANY, *Respondent*.

PETITION FOR REHEARING

Idaho Power Company prays that the Court grant rehearing of its decision and judgment of November 10, 1952 reversing the judgment of the Court of Appeals for the District of Columbia.

REASONS FOR GRANTING A REHEARING

I. Idaho Power Company respectfully submits that such decision misinterpreted the intent of Congress in enacting the Public Utility Act of 1935. It is our contention that the legislature inserted Section 201(f) in the statute specifically to protect all "public utilities" subject to the Federal Power Act regardless of whether or not they are also "licensees" under Part I. As the facts show, Idaho is both a "licensee", and a "public utility" under Part II

of the Act (R. 30). Moreover, the Federal Power Commission has specifically determined that it is a "public utility" under the Act, 1 FPC 696, 697 (1937).

In support of this contention, we submit, first, the affidavit, annexed hereto as Appendix A, of the Honorable Charles A. Wolverton, Representative in the Congress from the State of New Jersey and senior member of the House Committee on Interstate and Foreign Commerce. As such affidavit, as well as the opinion of the court below and the Brief and Supplemental Memorandum submitted by the Commission in this Court, indicates, Congressman Wolverton took the leading role in the discussions in those parts of the hearings before the House Committee relating to the precise issue here.

This affidavit refutes the contentions made in the Commission's brief that the addition of Part II to the Act had no effect upon the Commission's power to condition licenses. Specifically it makes clear that the interrogation, by Mr. Wolverton, of Mr. Dozier DeVane, the Solicitor of the Federal Power Commission at the time of the 1935 amendments, was directed to the Wheeler-Rayburn bill as a whole, and not merely to Part II of the Act (Commission's brief pp. 42-44). Hence, it seems clear that the intent of the draftsmen of the bill was to prevent the forced interconnection of the facilities of *any* privately owned electric utility company with those of the federal government or of any state or municipality.

Such affidavit further establishes that Congress was very careful to integrate the provisions of the old Federal Water Power Act as a component of the new statute and made sure, by substituting the word "Part" for the word "Act" in Sections 6 and 10(g), that licenses issued under that Part must be "in conformity" and "not inconsistent" with the provisions of the "Act" as a whole, including the limitation on the powers of the Commission contained in Section 201(f).

Most importantly it shows that Congress did not intend to create one type of regulatory authority over electric

companies that were both "public utilities" and "licensees" under the Act, and another type of regulatory authority over companies that were solely "public utilities" under Part II, with respect to this highly controversial and much discussed aspect of the Wheeler-Rayburn bill involving the interconnection of the facilities of such companies with those of other persons. It therefore follows that a company, such as Idaho, which is also a "public utility" under the Act and subject to regulation under Part II of the Act is also entitled to the benefits of the safeguards provided by that Part in Section 201(f).

This contention is further reinforced by that part of the Senate Report on the Wheeler-Rayburn bill (S. Rep. No. 621, 74th Cong., 1st Sess.) which was overlooked by the Commission in its brief. In the government's brief (p. 45) reference is made to page 19 of such Report which explains in general terms the purpose of Section 201(f). But the brief fails to mention the further explanation of this Section in that part of the Report analyzing the substitute bill, section by section. At p. 49 the Senate Report states:

> "Subsection (e) [which became Section 201(f) on final enactment] expressly excludes from the operation of the *Act* the United States, the States, municipalities, and all of their agencies. It is designed to make perfectly clear that no compulsory powers may be exerted upon public projects or upon privately owned *projects** for the benefit of public plants."

This quotation speaks specifically in terms of the *Act* as a whole, and of public and privately owned *projects*, not merely of "private utilities" (*id.* p. 19).

The word "project" is a technical term and appears only in Part I of the Act, where it is defined in Section 3(11). It would seem evident that the Senate Report recognized that the important things to be protected from forced interconnection with facilities of the government were the

* Emphasis supplied throughout unless otherwise indicated.

hydroelectric projects of private companies, and "the primary line or lines transmitting power therefrom" (Sec. 3(11)), subject to the licensing authority of the Commission under Part I.

It is respectfully submitted that, regardless of what the scope of the Commission's authority to impose license conditions was under the old Water Power Act, it cannot today contravene the prohibitions of Section 201(f) in conditioning a license issued to a company, such as Idaho, which is also a "public utility" under Part II of the present statute.

Such a conclusion is also entirely in accord with the recent decision of this Court in *Pennsylvania Water Power Company* v. *Federal Power Commission*, 72 S. Ct. 843, 845 (1952), where it was held that:

> "Although Penn Water is the type of 'public utility' subject to regulation under Part II of the Act, it argues that since it is subject to regulation under Part I as a licensee it cannot be regulated under Part II as a public utility. We cannot agree. With some express exceptions not here relevant the language of Part II of the Act makes all public utilities subject to the regulation it prescribes * * * ."

Consequently, with respect to Idaho there was no necessity for the Court to find authority for interconnection in the general provisions of Sections 4(g) and 10(a) of Part I. The authority to require "interconnections" is established specifically in Section 202(b) of Part II. *However, such authority for interconnection is expressly limited in Section 201(f), and the federal government is prohibited from attempting to utilize that authority in its behalf.*

II. Secondly, we wish to bring to this Court's attention certain aspects of the legislative history of Sections 4(g) and 10(a) of Part I of the Act. This legislative history has not been previously discussed and has only now become significant in the light of this Court's decision of November 10th, and indicates that Congress never intended to authorize the Commission to require, under Part I, the forced

interconnection of private transmission facilities with those of the Government.

This Court's opinion states that Part I of the Act is the source of the Commission's authority to condition licenses. From that premise it follows that whatever powers the Congress granted to the Commission in this respect must be ascertained from the legislative history of the former Federal Water Power Act of 1920 (41 Stat. 1063), which became Part I of the present Act.

The legislative history of Section 10(a), which makes no reference to the public lands but solely to "waterways", is illuminating. In the *Hearings before the House Committee on Water Power,* (65th Cong., 2nd Sess., 1918), Mr. O. C. Merrill, the representative of the Secretary of Agriculture in drafting the final bill, and thereafter, and for many years, the Secretary of the Federal Power Commission, described Section 10(a) as follows (p. 62):

> "Section 10 prescribes the general conditions which shall be put in all licenses, *whether on public lands* or on navigable rivers. The first provision is that the project shall be such as will make a comprehensive scheme of development *of the stream or the section of the stream to which the license is to apply.* I think it is extremely important that that should be carried out strictly in the administration of the bill, because the chief concern of the Government is to secure the most *complete development of the power* that is practicable or possible."

And again at pages 96 and 97:

> "Not only should the scheme of development be considered in relation to irrigation and to navigation and to water power, but also to flood control. There will be many projects in different parts of the United States where flood control is concerned, and where it should be within the power of the Commission to require structures, reservoirs, etc., to be built in such manner or used in such manner that they may be of benefit in flood control as well as in irrigation, navigation, and water-power development."

It therefore follows that securing the utmost development of the *water* in a *particular stream, or in a particular section thereof*, is the criterion for issuing a particular license. The "scheme of development" in no way relates to the transmission of power from other projects located in *other* streams, or in other sections of the same stream, over the transmission-lines leading from the particular hydro project. There is thus made clear the sharp distinction, throughout the entire original statute, between the development of the Nation's water resources and the mere ancillary use of such public lands as may be crossed by the transmission lines carrying the final product to the market place. The Commission's task is to develop and conserve water power, not the vast tracts of barren, and largely unusable, public lands in the West.

Turning to Section 4(g) it should be noted that this Section of the Act did not come into existence until the 1935 amendments and therefore could not have been an *original* source of licensing power to the Commission. Nowhere below did the Commission purport to rely on this section as authority for the imposition of conditions in the license. Nor could it have properly done so because the legislative history of this added subsection makes clear that it is solely procedural in nature. The Senate Report (No. 621, 74th Cong., 1st Sess., 1935) states at page 43:

> "A new subsection (g) is added to section 4 to authorize the Commission to investigate the occupancy of power sites on waters under its jurisdiction, and to issue appropriate orders to preserve its authority *over the navigable waters entrusted to its care.* This subsection would enable the Commission to conduct its own investigations instead of waiting for matters to be brought formally to its notice, and to proceed directly to prevent violations, instead of having to call upon the War Department or the Attorney General to take action."

And again a few lines up in the same page, referring to Section 4 as a whole the Report states:

"The provisions for the issuance of licenses on public lands and for the utilization of surplus power of Government dams are left unchanged."

It is therefore respectfully submitted that, in light of this legislative history, Sections 4(g) and 10(a) did not confer any general authority or guardianship upon the Commission over the "public lands", as contrasted with waterways and water resources.

The source of the Commission's authority therefore must be found, if any place, in the specific licensing sections of the Federal Water Power Act, and not in any general or inherent power over the public lands. The licensing sections are 4(e), 6 and 10(g). Section 4(e) authorizes the imposition of conditions "for the adequate protection and utilization" of any reservation affected by a particular project. The only "reservations" affected here are 27.4 miles of right-of-way across reclamation withdrawals, out of a total of 189 miles. It is patent that the "wheeling" of government power has no reasonable relation to the "protection and utilization" of such reservations.

All that is left is the general authority of Sections 6 and 10(g) permitting the imposition of conditions "in conformity" and "not inconsistent" with the Act. Without reciting a catalogue of possible consistent conditions, it would seem clear that the imposition of the duty of a common carrier, or a carrier of government power, is totally inconsistent with the basic concept behind the enactment of the original Federal Water Power Act—that electric utilities subject thereto were *not* to be made common carriers. As we pointed out in our brief (pp. 38-40) the amendment proposed by Representative Mays expressly constituting transmission line licensees as "common carriers",[1] was defeated.

Further, in Section 16 of the Act, the rights of the Government to take possession of, and to use "any project,

[1] "That all *transmission lines* constructed or operated under authority of this act shall be constructed, operated, and maintained as *common carriers*." (58 Cong. Rec., 66th Cong., 1st Sess., (1919) p. 2136.)

or part thereof," were specifically dealt with and provided for, but under conditions specifically set forth in the Act.[2] These provisions, coupled with the defeat of the Mays amendment, make it clear that the powers here contended for were *openly before the Congress, directly considered, and withheld.*

Equally indicative of the contemporaneous intent of Congress is the history of the Mineral Leasing Act of February 25, 1920, as amended August 21, 1935, (41 Stat. 449, c. 85, sec. 28; 30 U. S. C., sec. 185). This statute is in many respects a twin to the Federal Power Act. Both deal with related subjects involving the use of the public lands and resources, both were passed in 1920, both were amended in 1935, and the Mineral Leasing Act preceded the Federal Power Act both in original passage and in the later amendment.

The Mineral Leasing Act (as adopted in 1920) provided for rights of way for pipe lines, but—"upon the express condition that such pipe lines shall be constructed, operated, and maintained as common carriers." This language is almost identical with that proposed in the Mays amendment, which the House shortly thereafter defeated and rejected for inclusion in the Federal Water Power Act of 1920.

But even though the carrier principle was adopted in the Mineral Leasing Act in 1920, Congress obviously did not intend or construe this to require the transportation of oil or gas from *government* fields, because—*a few days prior to the 1935 amendments* to the Federal Power Act,—the Mineral Leasing Act was also amended to include another specific condition, that such pipe lines—

> "shall accept, convey, transport * * * without discrimination, oil or natural gas produced from government lands in the vicinity of the pipe line in such proportionate amounts as the Secretary of the Interior may * * * determine to be reasonable."

[2] As this court stated in *MacEvoy Co.* v. *United States*, 322 U. S. 102, 107 (1944): "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment' ".

It is thus evident that Congress, in 1920, did not intend that pipe lines or transmission lines crossing the public domain be required to carry oil, natural gas or electricity produced from Government sources, nor, in the case of electric utilities, to make them common carriers.

We therefore respectfully submit that, in the language of *Williamson v. United States*, 207 U. S. 425, 461 (1908), a party cannot be "compelled to do that * * * which the act of Congress must be considered as having expressly excluded", and that administrative action taken "to achieve that which Congress refused to enact into law cannot be sustained", *Colgate-Palm Olive-Peet Co. v. National Labor Relations Board*, 338 U. S. 355, 364 (1949).

CONCLUSION

For the reasons set forth above and in our brief and argument, it is respectfully urged that rehearing be granted and that, upon such hearing, the judgment of the Court of Appeals be reversed only to the extent that it affirmed the Commission's order as modified, and that the cause be remanded to the Federal Power Commission for entry of an order in accordance with the opinion of the Court below.

Respectfully submitted,

HARRY A. POTH, JR.,
REID & PRIEST.
910 17th St., N. W.
Washington 6, D. C.
A. C. INMAN
1220 Idaho Street
Boise, Idaho

JAMES E. O'BOYLE
FRANCIS H. CASKIN
Of Counsel.

Certification of Counsel

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

HARRY A. POTH, JR.
Counsel for Idaho Power Company

APPENDIX A

STATE OF NEW JERSEY }
COUNTY OF CAMDEN } ss:

CHARLES A. WOLVERTON, being duly sworn, deposes and says:

That I reside at Merchantville, New Jersey;

That I am, and have been since November 1926, a representative in The Congress of the United States from the State of New Jersey;

That I am, and have been since 1933, a member of the Committee on Interstate and Foreign Commerce of the House of Representatives and was a member thereof in the year 1935, when that Committee considered and passed upon the Public Utility Act of 1935, including the amendments to the Federal Water Power Act of 1920;

That during the hearings on the House Bill (H.R. 5423, 74th Cong., 1st Sess.), which, combined with the Senate Bill, after conference, became the Public Utility Act of 1935, I interrogated Mr. Dozier DeVane, then Solicitor of the Federal Power Commission and who had participated in the drafting of the bill, as to the intent of the draftsmen to require the interconnection of the transmission lines of private companies with those of the Government;

That my questions to Mr. DeVane, during such hearings, made no distinction between electric "public utility" companies, as defined in Part II of the Federal Power Act, and private electric utility companies in general (Hearings before the House of Representatives Committee on Interstate and Foreign Commerce on H.R. 5423, pp. 514-515);

That it was at that time and still is my understanding that the references in my questioning of Mr. DeVane to "this bill" was to the House Bill as a whole and not merely to Title II of Title II of the Bill, which Title is now Parts II and III of the Federal Power Act. There is no doubt at all in my mind as to this;

That I am also familiar with the specific amendments to what is now Part I of the Act and the fact that in some twelve different places in such Part I the word "Act" was changed to the word "Part", and that it is my recollection and opinion that the purpose of these changes was to relate and integrate what is now Part I with the other Parts of the present Act so as to eliminate any doubt that the Federal Power Act is a single instrument and not three separate statutes;

That as a member of the House Committee on Interstate and Foreign Commerce it was and still is my opinion that it was not the intent of Congress to give the Federal Power Commission one type of regulatory authority over electric companies that were both "public utilities" and "licensees" under the Act, and another type of regulatory authority over companies that were solely "public utilities" under Part II with respect to the interconnection of their facilities with those of other persons.

/s/ CHARLES A. WOLVERTON

Subscribed and sworn to before me this 2nd day of December, 1952.

/s/ DORA E. ROSE,
Notary Public of N. J.

(Seal)

Comm. exp. Aug. 25, 1957.